IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 434

SINCLAIR REFINING COMPANY, A CORPORATION,
Petitioner,

vs.

SAMUEL M. ATKINSON, ET AL.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI AND SUGGESTION FOR EXPEDITED CONSIDERATION OF CASE.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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May it Please the Court:

1.

Respondents do not challenge the importance of the question raised by our petition but suggest their companion petition also be allowed. The difficulty with respondents' position is that the numerous and speculative questions posed in their petition are not actually presented in the present posture of the case and were not passed on by the courts below. Questions as to the extent to which a court may enjoin continuation *in futuro* of an illegal course of conduct, or as to the breadth or limitations of an injunction, were not reached by the courts below, which simply held that *Norris-LaGuardia* com-

pletely precluded injunctive relief. Such questions, accordingly, are not presented here, nor could they well have been presented below on a naked motion to dismiss, but it may be noted that particularly in the labor field relief *in futuro,* based on past conduct, is no novelty. (See *e.g., N. L. R. B.* v. *Express Publishing Co.,* 312 U. S. 426; *May Dept. Stores* v. *N. L. R. B.,* 326 U. S. 376.)

2.

It is again respectfully suggested that this case presents clearly the question of whether a contract, collectively bargained under the National Labor Relations Act and containing a negative covenant against strikes, with an affirmative covenant that employee grievances "must" be submitted to a grievance procedure terminating in arbitration, is enforceable by injunction against a union as well as so enforceable against an employer.

Possible problems arising from absence of a "grievance" and absence of a compulsory arbitration clause, existing in *Yellow Transit* (No. 13, this term), now awaiting decision, are not present here. This case is the counterpart in the industrial field of *Chicago River* in the transporation field. Considerations of symmetry in the law require, we believe, a decision like *Chicago River* here. While we do not not think *Norris-LaGuardia* was intended to prohibit federal courts from effectively enforcing agreements to arbitrate, or that a question of adherence to a contract which supposedly settled whatever disputes the parties may have had prior to its making is a "labor dispute" under proper construction of the *Norris-LaGuardia* definition of that phrase, nevertheless the problem of reconciling *Norris-LaGuardia* and *Taft-Hartley* (if that be deemed necessary) is far simpler here than in *Yellow Transit.* The employer here relies not only on Section 301 of *Taft-*

Hartley (as in *Yellow Transit*) but on Section 203 (d) of *Taft-Hartley* stating the national policy in favor of arbitration, and on Section 8 of *Norris-LaGuardia*, also expressing a policy favoring or supporting arbitration.

The question is important and should be settled.

SUGGESTION FOR EXPEDITED CONSIDERATION.

The issue here is closely related to that in *Yellow Transit*, which the Court already has studied and now has under consideration. Lengthy briefs here would probably not be of great assistance to the Court, although briefs explaining and defining the precise issue and the precise positions of the parties might aid the Court. It is suggested that important though this case is, the Court's recent study of the general field in *Yellow Transit* has made this case suitable for early disposition on the summary calendar.

Respectfully submitted,

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October 20, 1961.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 430

SAMUEL M. ATKINSON, ET AL.,
Petitioners,

vs.

SINCLAIR REFINING COMPANY,
Respondent.

BRIEF FOR THE PETITIONERS IN NO. 430 AND FOR THE RESPONDENTS IN NO. 434.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

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vs.
SINCLAIR REFINING COMPANY, *Respondent.* } No. 430.

SINCLAIR REFINING COMPANY, *Petitioners*,
vs.
SAMUEL M. ATKINSON, *et al.*, *Respondents.* } No. 434.

BRIEF FOR THE PETITIONERS IN NO. 430 AND FOR THE RESPONDENTS IN NO. 434.

OPINIONS BELOW.

The opinion of the District Court For The Northern District of Indiana, Hammond Division, is reported at 187 F. Supp. 225 (1960), (R. 42).[1] The opinion of the Court of Appeals for the Seventh Circuit is reported at 290 F. 2d 312 (1961) (R. 65).

JURISDICTION.

The judgment of the Court of Appeals For The Seventh Circuit (R. 81) was entered on April 25, 1961. On July 10, 1961, Mr. Justice Clark extended the time for filing

1. Reference to the Record will be indicated by the letter "R" followed by the page number in the Record printed by the Clerk of this Court.

a petition for certiorari in No. 430 to and including September 22, 1961. (R. 82.) On July 19, 1961, Mr. Justice Clark extended the time for filing a petition for certiorari in No. 434 to and including September 22, 1961. (R. 83.) The petitions in Nos. 430 and 434 were filed on September 22, 1961, and granted on December 11, 1961 (R. 83, 84.) On December 11, 1961, Nos. 430 and 434 were consolidated by order of this Court. (R. 83, 84.) This Court's jurisdiction rests on 28 USC Par. 1254(1).

Pursuant to the Court's order consolidating 430 and 434, this Brief encompasses the position of all the parties who are petitioners in 430 and the same parties as respondents in 434.

QUESTIONS PRESENTED.

A. Questions Presented in No. 430 Are as Follows:

1. The first basic question is whether a federal district court is required to dismiss, or in the alternative, to stay a suit for damages for breach of the no-strike clause of a collective bargaining agreement brought by an employer against an international union and a local union under Section 301 of the Labor Management Relations Act (1947), as amended (61 Stat. 156; U. S. C. 185), and against local union officials pursuant to the court's diversity of citizenship jurisdiction pending arbitration of the dispute under the terms of the bargaining agreement. Subsidiary questions involved are as follows:

(a) Whether an employer's claim that an international union, the international's local affiliate, and local union officials, participated in and instigated work stoppage in violation of a no-strike clause of a collective bargaining agreement, raises arbitrable issues under the arbitration provisions of the agreement.

(b) If an employer's claim of breach of a no-strike

clause raises arbitrable issues under the bargaining agreement, whether a federal district court is required to specifically enforce the arbitration provision of the agreement under Sec. 301 of the Labor Management Relations Act and to thereby dismiss, or in the alternative, to stay the employer's suit for damages for breach of the no-strike clause pending decision by the arbitrator.

2. The second basic question is whether a federal district court is required to dismiss, or in the alternative, to stay a suit for damages for breach of the no-strike clause of a collective bargaining agreement brought by an employer against an international union and a local union under Section 301 of the Labor Management Relations Act (1947), as amended (61 Stat. 156; 29 U. S. C. 185), and against local union officials pursuant to the court's diversity of citizenship jurisdiction, pending arbitration of common issues of fact and contract interpretation and application which have been raised by grievances submitted to arbitration prior to the initiation of the lawsuit, protesting disciplinary action by the employer against employees who are local union officials for allegedly instigating and participating in a breach of a no-strike clause.

3. The third basic question is whether a federal district court is required to dismiss a suit for damages brought by an employer against employees who are local union officials, in their individual capacities, pursuant to diversity of citizenship jurisdiction for their alleged participation in and instigation of a breach of a no-strike clause of a collective bargaining agreement, which had been entered into between an employer and an international union and its local affiliate. Subsidiary questions involved are as follows:

(a) Whether a cause of action exists under federal

law against employees and union officials for alleged participation and instigation of a work stoppage in violation of a no-strike clause.

(b) Whether a cause of action against employees and local union officials brought under the common law of the State of Indiana, conflicts with federal substantive law under Section 301 of the Labor Management Relations Act.

(c) Whether a cause of action against employees and local union officials, in their individual capacities, for the aforesaid conduct brought under the common law of the State of Indiana, conflicts with the jurisdiction of the National Labor Relations Act, 61 Stat. 136; 29 U. S. C. 141.

(d) Whether the no-strike clause of collective bargaining agreement entered into between an employer corporation and a union organization, imposes individual contractual responsibilities on each employee to the employer.

(e) Whether the aforesaid suit for damages against local union officials in their individual capacities, is a valid cause of action cognizable under state common law.

B. Inasmuch as Our Position, as Respondents, Is Joined With Our Position as Petitioners in the Same Brief, We Believe It Expeditious to Fully Set Forth the Questions Presented by the Grant of Certiorari to the Petitioner in 434. The Petition in 434 Raises Two Basic Questions:

1. The first basic question is whether the Clayton Act, 38 Stat. 738; 29 U. S. C. Sec. 52, and the Norris-LaGuardia Act, 47 Stat. 70; 29 U. S. C. Para. 101, require a federal district court to dismiss an action brought by

an employer for a preliminary and then permanent injunction against an international union, a local union, local union officials and all of their agents, servants, and counsellors from aiding, abetting, fomenting, advising, participating in, ratifying, or condoning any strike, stoppage of work, slow-down or any disruption of, or any interference with, normal employment or normal operation or production by any employee within the bargaining unit at the employer's refinery, which is in support of, or because of any matter or thing which is or could be the subject of a grievance under the present and any future collective bargaining agreement between the unions and the employer. Subsidiary questions raised are as follows:

(a) Whether Section 301 of the Labor Management Relations Act supersedes or has, in effect, repealed or modified the Clayton and Norris-La Guardia Acts.

(b) Whether the requested injunction, which is designed to operate over possible future labor disputes, conflicts with the provisions for resolving collective bargaining controversies established by Section 301 of the Labor Management Relations Act.

(c) Whether the requested injunction conflicts with the jurisdiction of the National Labor Relations Board over labor disputes.

2. The second basic question is whether a federal district court, under established rules of equity, has the power to grant the requested injunction which is designed to operate over future bargaining agreements between an employer and a union.

STATUTES INVOLVED.

Section 301 of the Labor Management Relations Act (1947), 61 Stat. 156, 29 U. S. C. 185, provides, in pertinent part, as follows:

> "Sec. 301(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> "Sec. 301(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

Section 20 of the Clayton Act, 38 Stat. 738, 29 U. S. C. Sec. 52, provides, in pertinent part, as follows:

> "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the applica-

tion, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other monies or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

Section 1 of the Norris-LaGuardia Act, 47 Stat. 70; 29 U. S. C. Par. 101, provides as follows:

"No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

Section 4 of the Norris-LaGuardia Act, 47 Stat. 70; 29 U. S. C. Par. 104, provides, in pertinent part, as follows:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing

out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other monies or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 103 of this title."

STATEMENT.

The Petitioners in No. 430, and Respondents in No. 434, are Oil, Chemical and Atomic Workers International Union, AFL-CIO; and its local affiliate, Local 7-210 of the Oil, Chemical and Atomic Workers International Union, AFL-CIO (hereinafter referred to respectively, as the "International" and the "Local"), labor organizations representing production and maintenance employees at Sinclair Refining Company's refinery located in East Chicago, Indiana; and Samuel M. Atkinson, and other named individuals, all employees at the aforesaid refinery who are also members and officials of the Local and members of the International (hereinafter referred to as the "Local Officials"). Sinclair Refining Company is a corporation (hereinafter referred to as the "Employer"), owning and operating the aforesaid oil refinery. The Employer is alleged to be incorporated under the laws of the State of Maine, maintaining its principal office in the State of New York. The Employer is engaged in an industry affecting commerce and subject to the Labor Management Relations Act.

In August, 1957, the Employer and the International and Local entered into a collective bargaining agreement (hereinafter referred to as the "Agreement.") (R., Ex. A. 19.) The Agreement covers wages, hours and working conditions. In June, 1959, the Agreement expired and a new agreement was negotiated and entered into between the Employer and the Union.

Article III of the Agreement contained a no-strike clause, which is one of a type usually found in labor-management contracts, limiting the right of the contracting union to cause strikes or work stoppages during the course of the bargaining agreement. Article XXVI of the Agreement contained a provision for the compulsory arbitration of

any difference regarding wages, hours, or working conditions, between the parties hereto, or between the Employer and an employee, covered by this working Agreement, which might arise within any plant or within any region of operations, which could not be satisfactorily resolved through a grievance procedure, or by settlement of the parties. Article XXVI is followed by an additional paragraph, entitled, Article XXVII, "General Disputes," providing that "[I]n the event any dispute or disagreement arises between the parties hereto regarding wages, hours, or working conditions, which is general in character, or which affects a large number of employees of any one of the Employers to which this agreement is applicable, such dispute shall be referred for settlement to the Director of Industrial Relations for the Sinclair Companies, or someone designated by him, and the President of the Oil, Chemical and Atomic Workers International Union, AFL-CIO, or someone designated by him."

On or about February 13-14, 1959, a work stoppage took place among the employees at the East Chicago refinery. Following the work stoppage, the Employer disciplined twelve employees who were Local Officials for allegedly breaching the no-strike clause of the Agreement by fomenting, assisting, and participating in the work stoppage. The Local denied that any of the twelve Local Officials were in any way responsible for the work stoppage and filed grievances on their behalf with the Employer, as provided by Article XXVI of the Agreement. The Local and the Employer were unable to resolve these grievances so that the right of the Employer to discipline any and all of the Local Officials has been jointly submitted by the Employer and Local to arbitration. As of this date, the dispute still awaits arbitration since there has not been a joint selection of an impartial arbitrator as required by the Agreement. (R. 24.)

During the time the Local was processing the aforementioned grievances, the Employer commenced the subject lawsuit in the United States District Court for the Northern District of Indiana. The Employer sought damages in the sum of $12,500.00 from the International and Local for breach of the no-strike clause of the bargaining agreement pursuant to Section 301 of the Labor Management Relations Act.

Count I of the Employer's Complaint alleged that the International and Local had breached the Agreement through the acts of the Local Officials (committeemen) and other duly authorized and acting agents in causing the aforesaid work stoppage. (See Complaint, Count I., par. 7, R. 11.)

Count II of the Employer's Complaint sets forth a cause of action for damages in the sum of $12,500.00 against the Local Officials, in their individual capacities, for conspiring to and causing the alleged breach of the agreement "* * * individually and as officers, committeemen and agents of the * * * labor organizations * * *." (Complaint, Count II, par. 9, R. 13.)

Count II is based on a common law tort theory and was brought in the Federal District Court pursuant to diversity of citizenship jurisdiction. (Complaint, Count II, par. 1, R. 12.)

Count III of the Complaint sought a declaration of rights and a preliminary, and then, permanent injunction against the International and Local; Local Officials; and their agents, servants, counsellors, and all to whom notice may come from in any way participating in, ratifying, or condoning any strike, stoppage of work "* * * aiding, abetting, fomenting, advising, participating in, ratifying, or condoning any strike, stoppage of work, slow-down, or disruption of, or interference with, normal employment or normal

operation or production by any employee within the bargaining unit (at the Employer's East Chicago refinery), covered by the contract by the parties * * * in support of, or because of any matter or things which is, or could be, the subject of a grievance under the grievance procedure of the said contract, or any extension thereof, or any other contract between the parties which shall contain like, or similar provisions." (Complaint, Count III, par. 2, Prayer, R. 18.) Count III of the Complaint was founded on diversity jurisdiction and Section 301.

All the defendants filed motions to dismiss the complaint, or in the alternative, to stay the action in the trial court. (R. 20-25.) In summary, these motions were based on the following contentions:

1. The issue whether any and all of the defendants breached the no-strike clause of the Agreement was first subject to adjustment and determination under the arbitration procedures of the Agreement.

2. The action should be stayed until a determination has been made on common issues of contract interpretation and application, and fact by an arbitrator over the grievances then pending between the Employer and Local on behalf of the Local Officials.

3. No cause of action exists against the Local Officials, in their individual capacities, by virtue of the provisions of the Labor Management Relations Act.

4. No valid common law action has been set forth in the Complaint against the Local Officials, in their individual capacities.

5. The action for declaratory judgment and injunction against all of the defendants is contrary to the anti-injunction provisions of the Clayton and Norris-La Guardia Acts.

6. The action for an injunction is beyond the equity powers of the court to grant.

The District Court dismissed the action against the Local Officials, in their individual capacities. The Court held that Sec. 301 of the Labor Management Relations Act does not allow recovery against individuals for breach of bargaining agreements, and that the Act "* * * is the statutory source of federal law governing remedies for violations of collective bargaining contracts." (R. 44.) The District Court also held that under established common law principles, union officials, as is the case of officers and employees of a corporation, "* * * cannot be held liable for inducing a breach of (their organization's) contract." (R. 44.) In dismissing the action against the individual defendants, the District Court concluded:

> "Drawing, then, from general corporate law, and relating it to suits for breaches of collective bargaining contracts under Sec. 301, as that section has been construed by the Supreme Court, the conclusion is inevitable that suits of the nature alleged in Count II are no longer cognizable in State or Federal courts." (R. 44-45.)

Following the dismissal of the suit against the Local Officials, the Employer moved for leave to file an Amended Count II to the Complaint. The allegations against the Local Officials in their individual capacities, contained in the amendment, repeated those in the original Count II, except for one modification. The individuals are alleged, not only to have caused a breach of the agreement, but, thereby, to have caused the breach of individual employment contracts for every one of the 999 employees alleged to have engaged in the work stoppage. (R. 56.) The trial court denied leave to amend the Complaint. (R. 59.)

The District Court also dismissed the action for a declaratory judgment and injunction against all of the parties on the basis that "* * * the suit at bar involves a labor dispute within the meaning of * * * the Norris-LaGuardia

Act * * *." (R. 45.) In this light the Court further held that the Labor Management Relations Act does not remove the coverage of prior anti-injunction legislation "* * * so as to permit the specific enforcement of a no-strike clause in a labor contract." (R. 45.)

The District Court denied the defendant's motions to dismiss or stay the action pending arbitration of the dispute. The court held that Section 301 assigned to the court "* * * the duty of determining whether the union had breached its promise not to strike over arbitrable grievances." (R. 46.) The court reasoned that since a labor union can sue in the federal courts for specific performance of an employer's agreement to arbitrate a dispute, similarly, the employer has a right to sue the union for violations of a no-strike pledge. (R. 46.)

Regarding the pending arbitration between the parties the District Court denied the defendants' position and summarily held that the "* * * arbitration of grievances filed by union members over disciplinary action taken by the company as a result of the alleged strike involves issues quite distinct from the issue whether the union violated its contract." (R. 46.)

The International and Local appealed the District Court's denial of their motions to dismiss or stay the action pending arbitration to the Court of Appeals For The Seventh Circuit pursuant to Title 28 of the United States Code, Sec. 1292(a)(1). The Employer appealed from the dismissal of the action against the Local Officials and its action for a declaratory judgment and injunction to the Court of Appeals, pursuant to the interlocutory appeals provisions of Title 28, U. S. C., Sec. 1292(b). On appeal, the Court of Appeals affirmed, in part, and reversed in part the District Court's findings. (Opinion of Court of Appeals, R. 65.) The dismissal of that part of the law

suit seeking a declaratory judgment and injunction was affirmed. The Seventh Circuit sustained the District Court's holding that the Norris-La Guardia Act bars such an action. As the trial court, the Seventh Circuit concluded that "* * * there is nothing in the general language of Section 301, nor its purposes, as disclosed by the legislative history, which evidences conflict with Norris-La Guardia." (R. 78.)

The Court of Appeals reversed the District Court's decision, dismissing the action against the Local Officials in their individual capacities. Contrary to the trial court, the Court of Appeals reasoned that Section 301 does not preclude liability of individual employees for inducing, or participating in, the work stoppage during the term of a no-strike clause of a bargaining agreement. In so holding, the Court of Appeals concluded that whereas, suit against individuals could not be maintained under 301, this did not foreclose an action against individual members and officials for breach of individual contracts of employment. In its decision, the Court of Appeals appears to reason that the provisions of a bargaining agreement between an employer and a union are read into and become a part of an employment contract between every individual in the bargaining unit and the employer. (R. 73-76.)

In remanding the action against the Local Officials, the Court of Appeals also rejected the District Court's finding that no common law action exists against the individuals, as agents and officers of their organization. The Court of Appeals distinguished the immunity of officers and agents of a corporation for participating in breaches of obligations entered into by their corporation with third parties. Unlike corporate officials, the court concluded that the Local Officials, in their role as employees, assume personal contractual obligations to their employer by

virtue of the bargaining agreement signed by their union. (R. 76.)

The Court of Appeals sustained the District Court's denial of a motion to dismiss or stay pending arbitration. As the trial court, the Court of Appeals concluded that the alleged breach of the no-strike provision of the agreement "* * * does not involve a subject which [the employer] has contracted to submit to arbitration." (R. 71.) In so holding, the court concluded "* * * that giving the language of the arbitration clause here under consideration its broadest scope it is not susceptible of an interpretation that covers the asserted dispute." (R. 71.)

The Court of Appeals also sustained the District Court's holding that the pending arbitration, challenging the Employer's disciplinary action against the Local Officials for instigating and participating in the work stoppage, was not relevant to the issues raised by the lawsuit. (R. 71-172.)

SUMMARY OF PETITIONERS' ARGUMENTS IN CASE NO. 430.

I. The trial court erred in denying the defendants' motion to stay this action and order the Employer to exhaust its remedies through arbitration. The trial court has the power to order a stay. The court's refusal to exercise this power was, in effect, in derogation of its responsibility to enforce arbitration agreements of collective bargaining contracts.

II. The issues raised in the Employer's complaint are subject to the primary jurisdiction of the arbitrator. The test of arbitrability, as recently established by the Supreme Court of the United States, is whether a collective bargaining contract is susceptible to an interpretation that covers the asserted dispute. Based on this test alone and the four corners of the bargaining contract between the parties, the trial court was clearly in error in refusing the stay.

III. The trial court was also in error in refusing to stay this action until the final determination of the pending arbitrations between the parties. The issues which shall be decided by arbitration are fundamentally the same which are presented by the complaint at law. A determination of the issues at arbitration will have a direct and binding effect on the continuation and outcome of this litigation. The denial of a stay, therefore, conflicts with the effective enforcement of arbitration agreements and awards and is contrary to the national labor policy and basic principles of the common law.

IV. The Employer does not set forth any cause of action against the Local Officials in their individual capac-

ities. Section 301 of the Taft-Hartley Act did not confer upon the Federal courts power to entertain an action against local union officials for breach of a collective bargaining agreement. The Employer's attempt to create a cause of action against the Local Officials under diversity of citizenship jurisdiction has no foundation in the common law and conflicts with the exclusive procedures established by Congress for the resolution of labor disputes.

SUMMARY OF RESPONDENTS' ARGUMENTS IN CASE NO. 434.

The Employer's request for an injunction against all future interferences with the grievance procedure of the bargaining agreement between the parties conflicts with the federal anti-injunction policy embodied in the Clayton and Norris-LaGuardia Acts. Furthermore, even if such an injunction had not been disallowed by Congressional action it is contrary to basic equity principles. The injunction would attempt to reach all forms of possible disputes under new bargaining agreements in the future. The effect of such an injunction would be to place primary control over the adjustment of labor-management disputes back into the courts in disregard of the integrated procedures developed and approved by Congress.

PETITIONERS' ARGUMENTS IN CASE NO. 430.

I.

THE DISTRICT COURT SHOULD HAVE STAYED THE ACTION AGAINST ALL OF THE DEFENDANTS BECAUSE THE ISSUE WHETHER ANY OR ALL OF THE DEFENDANTS BREACHED THE NO-STRIKE CLAUSE OF THE AGREEMENT IS FIRST SUBJECT TO ARBITRATION.

A. The Defendants' Motions to Dismiss or Stay the Action Until the Employer Exhausted Its Remedies Before an Arbitrator Should Have Been Granted by the District Court Under the Court's Power to Enforce Bargaining Agreements Conferred by Section 301 of the Labor Management Relations Act.

While this litigation has been in progress, the Supreme Court of the United States decided three landmark cases which unequivocally established arbitration as the prime method of resolving labor controversies arising during the term of collective bargaining agreements. *United Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Co.*, 363 U. S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960).

These decisions of the Court forged a link with the basic principles which had been set down in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957), so as to fashion a body of fundamental rules delineating the powers of courts and labor arbitrators. The *Lincoln Mills* decision gave mature status to

the arbitration process by directing the federal courts to enforce arbitration clauses of bargaining agreements and thereby assuring its standing as an integral part of national labor policy.

In *Lincoln Mills*, the Court upheld a union's right to sue under Section 301 of the Labor Management Relations Act for specific performance of an agreement with an employer to arbitrate unresolved grievances. Although the International and Local in the subject action were before the trial court as defendants, their position is comparable to the plaintiff-union in *Lincoln Mills*. In effect, the defendant unions were seeking the trial court to enforce the plaintiff-employer's arbitration commitment contained in the Agreement between the parties. Specifically, we submit that the Employer's claim that the International and Local and their officers and agents violated the no-strike clause of their Agreement raises arbitrable issues.

Lincoln Mills held that either party to a collective bargaining agreement has the right to submit the refusal to arbitrate by the other party to a district court for an order compelling performance. It is inconsistent with this holding to allow one of the parties to disregard the arbitration process and subject the other party to a suit for breach of their agreement over a dispute which properly is within the jurisdiction of this process.

The defendants, therefore, by seeking a stay compelling arbitration of the plaintiff-employer's claim that the no-strike clause has been breached are in the same position as though they had initiated an action for specific performance.

Prior to *Lincoln Mills* there was dispute whether the power of district courts to stay labor disputes under bargaining agreements pending arbitration was controlled by

the Federal Arbitration Act, 61 Stat. 669, U. S. C. 1. The Arbitration Act authorizes federal courts to stay suits for breach of contract if the parties had a prior agreement to arbitrate. We submit that questions concerning the relevancy of the Arbitration Act to collective bargaining agreements has been rendered moot by *Lincoln Mills.*

The Supreme Court in *Lincoln Mills* did not find it necessary to make any ruling on the Arbitration Act because the power of the district courts to order specific performance was based exclusively on Section 301 of the Labor Management Relations Act.

Although the issue has not been directly settled by the Supreme Court, whatever was the conflict before *Lincoln Mills* there has been uniform authority since that it is incumbent on the federal courts to stay disputes brought under Sec. 301, which properly belong to arbitration. *Drake Bakeries* v. *Bakery Workers,* 294 F. 2d 399 (C. A. 2, 1961), *en banc* decision reversing 287 F. 2d 155 (1961); *Yale & Towne Mfg. Co.* v. *Machinists,* 49 LRRM 2652 (C. A. 3, 1962). Cf. *Vulcan-Cincinnati* v. *Steelworkers,* 289 F. 2d 103 (C. A. 6, 1961) and the opinion of the Seventh Circuit in the subject case, which are contrary to the foregoing decisions on the issue of the arbitrability of breaches of no-strike clauses, but do not question the fundamental principle that actions subject to arbitration under bargaining agreements should be stayed. Cf. Prior *Lincoln Mills* decision by Seventh Circuit in *Cueno Press* v. *Paper Handlers' Union,* 235 F. 2d 108 (1956) cert. den'd 352 U. S. 912 (1957).

The identity of the issues raised by an action for specific performance to compel arbitration and a motion to stay pending arbitration was well stated by the District Court of Connecticut, shortly after *Lincoln Mills.* In *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283,* 167 F. Supp. 817 (D. C. Conn., 1958) appeal dis'd 269 F. 2d

618 (C. A. 2, 1959), the court granted a defendant-union's application for a stay pending arbitration in a suit for damages for breach of a bargaining agreement. In so holding, the court reasoned that its authority derived directly from *Lincoln Mills:*

> It is now settled that under Sec. 301(a) of the Labor Management Relations Act * * * Federal courts have jurisdiction to determine the obligations of parties to arbitrate disputes * * *. *Lincoln Mills,* it is true, was a suit to compel arbitration; but a correlative of the power to compel is the power to refuse to do so. * * * [W]hether arbitration should be ordered to go forward or stayed—is identical with *Lincoln Mills;* and it is this which determines jurisdiction rather than what party brings the suit. (167 F. Supp. 817, 818.)

B. The Collective Bargaining Agreement on Its Face Demonstrates That There Is a Responsible and Reasonable Basis to the Defendants' Position That This Dispute Is Subject to Arbitration.

In sustaining the trial court's decision that the alleged breach of the no-strike clause did not raise arbitrable issues, the Court of Appeals based its decision on a finding that the arbitration provisions of the Agreement do not encompass this type of dispute. The Seventh Circuit's decision does not reject our argument that disputes under Sec. 301 should be stayed if they are arbitrable. Rather, the Court rested its conclusion on its interpretation of the arbitration provisions of the Agreement. The Court of Appeals stated:

> "The arbitration clause here under consideration contracts to submit to arbitration only a grievance which is a 'difference regarding wages, hours, or working conditions.' The claim of the employer for damages relates to neither wages, hours, nor working conditions. It does not involve the subject which it has

> contracted to submit to arbitration. The arbitration clauses considered in *Warrior* and *American Manufacturing* were broad in scope. They called for arbitration of all disputes or differences as to the 'meaning' and 'application' of the Agreement. * * * We conclude that giving the language of the arbitration clause here under consideration its broadest scope it is not susceptible of an interpretation that covers the asserted dispute." (R. 70-71.)

We do not dispute the governing rule of law implicit in the Court of Appeals' reasoning. We submit, however, that the Court was in error in rejecting arbitration by impliedly concluding that its interpretation of the arbitration provisions of the Agreement forecloses other reasonable interpretations. We submit that this Court has assigned a more limited function to the federal judiciary in determining the arbitrability of labor disputes than that which was assumed by the Seventh Circuit. An analysis of the *Warrior* decision is particularly significant in this regard.

There is no doubt of the Supreme Court's intention to limit as much as possible the judiciary's interjection into the merits of a labor controversy when arbitration is an alternative. This Court recognized that it is necessary for a court to make some judgment regarding the terms of a collective bargaining agreement when faced with the problem of determining the arbitrability of a labor dispute. Each of the Supreme Court's decisions in *American Manufacturing, Warrior* and *Enterprise Wheel,* repeats and underscores the admonition that a court must not allow itself to impinge upon substantive issues of a dispute in determining whether the dispute is subject to arbitration.

American Manufacturing established the rule that whether a dispute will be ordered to arbitration, must not depend upon a court's predetermination of the merits of the claim of the party alleging a wrong. The *Warrior* de-

cision, companion to *American Manufacturing*, went further to limit the possibility of judicial interference with an arbitrable dispute. In *Warrior*, this Court not only stated that the judiciary may not review the substantive rights of a party governed by a bargaining agreement in deciding the issue of arbitrability, but a court must consciously avoid an indirect judgment on the merits by imposing its interpretation of the purely procedural terms of an agreement, which set forth the arbitration procedures.

In furthering a national policy favoring arbitration, *Warrior* necessarily requires the conclusion that as a corollary to an arbitrator's sole authority to determine the merits of a controversy, he must have extensive power to pass upon his own jurisdiction. In *Warrior* a union brought suit in a district court for a specific performance of the arbitration clause of its bargaining agreement over a dispute whether the employer had the right to contract out work, which had been performed by members of the bargaining unit. The arbitrator in *Warrior* was given authority over differences between the employer and the union "* * * as to the meaning and application of the provisions of * * * [the] agreements * * *." In addition to this standard arbitration clause the contract specifically excluded "* * * matters which are strictly a function of management * * *." The trial court in *Warrior* refused to order arbitration, concluding that the decision to contract work, on its face, was within the exclusionary provision of the arbitration clause as being strictly "a management function." As in *American Manufacturing* this Court held that the trial court had given too great a scope to its power to determine arbitrability. The Supreme Court held that judges must avoid placing their own interpretations on provisions of bargaining agreements in lieu of other reasonable interpretations, even if the issue goes to the basis of the arbitrator's authority. In the particu-

lar case, the court concluded that it must be left up to the arbitrator to decide whether contracting out was strictly a management function before the union's claim that the contracting out was in violation of other provisions of the agreement could be legitimately considered. The rule of law referred to by the Seventh Circuit in the subject case (R. 71) emerges from the *Warrior* opinion:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (363 U. S. 574, 582-583.)

In requiring the judiciary to place a self-imposition on its power, this Court acknowledged the greater social value of the arbitration process as an alternative to formal litigation:

> "* * * the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provision of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator." (363 U. S. 574, 585.)

We submit that if the arbitrability test of *Warrior* is properly applied to the present dispute, then it cannot be said with positive assurance that the arbitration provisions of the Agreement between the parties are not susceptible to an interpretation that covers the asserted dispute.

There is no apparent controversy that the arbitrator's jurisdiction under the Agreement is over "* * * any difference regarding wages, hours or working conditions between the parties hereto or between the Employer and an employee covered by this working agreement * * *." (Agreement, Art. XXVI, par. 1, R. 19); (see also decision of Court of Appeals at R. 70.)

The defendants submit that the above definition of the scope of an arbitrator's jurisdiction is sufficiently broad to encompass a claim by the employer that the international and local and their agents and officers violated the no-strike clause of the Agreement contained in Article III.

The terminology of Article XXVI, par. 1, defining an arbitrator's jurisdiction, are commonplace in labor agreements. The use of "hours, wages and working conditions" is reasonably understood to define the entire area of subjects for labor negotiations. The exact language is used in the Labor Management Relations Act to define the whole range of bargainable issues for the purpose of imposing a mutual obligation upon employers and unions to bargain in good faith. This language is contained in Section 8(d) of the Act, 29 U. S. C. 158(d) and taken with the right of labor to organize, which is guaranteed under Section 7 of the National Labor Relations Act, 29 U. S. C. 157, forms the cornerstone of the National Labor policy. The pertinent part of Section 8(d) reads as follows:

> "* * * to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect *to wages, hours, and other terms and conditions of employment*, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party * * *." (Emphasis added.)

The Court of Appeals' conclusion that the arbitration clause in *Warrior* is broader than in the subject case, is difficult to accept in light of the provisions of the Labor Management Relations Act. The clause in *Warrior*, providing for the arbitration of all disputes or differences as to the "meaning" and "application" of the Agreement, follows the language of Section 203(d) of the Act. This section is the source of the Federal Mediation and Con-

ciliation Services function of providing a panel of arbitrators upon the request of parties to a labor agreement. Section 203(d) is designed to encourage the use of arbitration as a means of settling disputes. The section reads in pertinent part as follows:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

If there is any difference between the scope of disputes covered by Section 8(d) and Section 203(d) of the Act, the likelihood is that Section 8(d) is the more comprehensive. It should be noted that the language of Article XXVI, par. 1, could reasonably include any labor dispute between the parties, which might arise during the term of the bargaining agreement, whether or not the dispute concerns an interpretation or application of existing contract provisions. It is highly unlikely that the parties to the Agreement meant a narrower scope of arbitrable disputes than that contained in Section 203 (d) since Article XXVI, par. 8 of the Agreement provides that the impartial arbitrator "* * * will be selected in accordance with the procedure of such Federal Mediation and Conciliation Service."

Although neither the Court of Appeals nor the District Court held that the dispute was *per se* not "a grievance," we believe that this may be argued by the Employer through inferences drawn from the opinions of the courts below. We submit that such a forced and restricted definition of "grievance," in this context, would be incompatible with the *Warrior* ruling. From the four corners of the Agreement, the intent of the negotiators appears to give breadth to the definition of a grievance as it is used in Article XXVI, par. 1. Paragraph 1 specifically defines a grievance as "any difference between parties or between

the employer and an employee." This distinction of differences directly between the parties to the Agreement, and those only involving an individual employee's complaint, is reinforced by the fact that the procedure for processing "employee grievances and disputes" is set forth in paragraph 2 of Article XXVI as a separate section. We submit that paragraph 2 was not designed as the exclusive means for bringing disputes to arbitration. This position is reinforced by paragraph 3 of Article XXVI, which provides a time limit for submission of a grievance by the employer *or* union "* * * within sixty (60) days from the date on which the complaint or grievance arose * * *."

Our position that the parties did not conceive of arbitration with very limited jurisdiction, is borne out by the language used in other paragraphs of Article XXVI. Paragraph 6 requires a final attempt between the parties to adjust differences before arbitration. It is significant that this paragraph provides that the President of the International and the Director of Industrial Relations for the Employer, are to attempt to resolve "grievances *or disputes*" (emphasis added), which have not been settled by local subordinate management representatives and the local union officials.

Our interpretation of the arbitration provisions of the Agreement are reinforced by Article XXVII. This short article specifies that "any dispute or disagreement" concerning wages, hours or working conditions, which is of a general nature, is to be submitted for settlement to the Employer's Director of Industrial Relations and the President of the International. Article XXVI mirrors the provisions of paragraph 6 of Article XXV. A reasonable construction of Article XXVII would require that disputes of a general character would be submitted directly to top management and labor officials, and if then they

could not be resolved, to arbitration. We hardly believe that Article XXVII is consistent with the view that the parties meant arbitration to play a limited role during the course of their bargaining relationship.

The lesson of *Warrior* is that the problem of separating issues of arbitrability from other substantive issues in a labor dispute, is not dissolved simply by the courts limiting themselves to a construction of only the arbitration provision of a bargaining agreement when faced with determining the initial jurisdiction of the arbitrator. A decision of the Seventh Circuit shortly after its opinion in the present action appears to fit comfortably with this Court's dictates in *Warrior*. In *Nepco Unit* v. *Nekoosa-Edwards Paper Co.*, 287 F. 2d 452 (C. A. 7, 1961), a union brought suit for specific performance to enforce arbitration over an employer's action in assigning an employee from outside the union's bargaining unit to a job vacancy within the unit. The employer contended that the dispute was not arbitrable because the bargaining agreement gave the employer complete discretion over job assignments. The arbitrator had jurisdiction to interpret and apply the contract. The Seventh Circuit ordered arbitration, but refrained from deciding the merits of the employer's position. In so holding, the Seventh Circuit stated that the arbitrator would have the prerogative of agreeing with the employer's contention that the dispute, in fact, was not subject for review by arbitration. In referring the matter to an arbitrator, the Seventh Circuit underscored the policy pronouncement of the Supreme Court "* * * favoring the use of arbitration as a means to achievement of industrial peace * * *."

The realities of the Seventh Circuit's method of ending litigation in *Nepco Unit* were explicitly set forth in a recent decision by the District Court for the Southern District of Texas in *Chemical Workers* v. *Jefferson Co.*,

48 LRRM 2974 (S. D. Tex., 1961). The court ordered specific performance of an arbitration clause concerning the employer's action in forcing a union member into retirement. The employer maintained that the issue was not arbitrable because retirement was solely a management decision under the bargaining agreement. The district court recognized that the arbitrator might concur with the employer's interpretation of the retirement provision of the agreement. Nevertheless, the court consciously refrained from prejudging the issue and concluded:

> "If these observations come close to an assertion that as a practical matter under present law the arbiter is to decide his own jurisdiction to act (to determine whether given matter is arbitrable) it is just that circumstances under which a court could say that [an] arbitration provision expressly provides, or there is the most forceful evidence of purpose to provide, for exclusion of [a] grievance from arbitration would seem hard to find." (48 LRRM, 2974, 2976.)

See recent decision of the Court of Appeals for the Ninth Circuit in *Engineers Union* v. *Crooks Bros.*, 48 LRRM 2988 (C. A. 9, 1961) in accord with the reasoning of the courts in *Nepco Unit* and in *Jefferson Co.* See also, William B. Gould, *The Supreme Court and Labor Arbitration,* 12 Lab., L. J. 331 (1961) in which the author, writing shortly after the Supreme Court's rulings in *American Manufacturing, Warrior* and *Enterprise Wheel,* speculates that the impact of these decisions will be to place most questions of arbitrability in the hands of the arbitrators.

C. The Trial Court Did Not Have Authority to Refuse to Stay the Action by Concluding that Alleged Breaches of No-strike Clauses, as a Class of Labor Disputes, Cannot Be Subject to Arbitration.

Unlike the Court of Appeals, the district court's opinion does not engage in an interpretation of the arbitration provisions of the agreement. The district court appears to hold that such considerations are not necessary, since "* * * Congress by (Sec.) 301 assigned to the courts the duty of determining whether the union has breached its promise not to strike over arbitrable grievances." (R. 46.) We fail to see how an alleged breach of the no-strike clause by the International and/or the Local has been carved out as an exception to arbitrable disputes by congressional mandate. No authority has held that alleged breaches of no-strike clauses as a matter of law can never be subjects for arbitration. In his Memorandum of Decision, the District Judge appears to reason that the issue of whether a work stoppage occurred over matters which are subject to arbitration does not raise any arbitrable questions. We submit that the effect of the trial court's reasoning is contrary to a developed industrial common law concerning the interpretation and application of no-strike clauses.

The trial court may have reached a decision by assuming that a no-strike clause is an absolute promise by the International and Local to assume liability, *individually and severally,* for losses resulting from every work stoppage which might occur. This is not an accepted understanding of such contract provisions.

The defendants submit that the question which should be presented to an arbitrator is not simply what are the damages to be assessed against the defendants for a work stoppage. There are a number of significant, prior issues

which must be resolved before that question is reached. *The first major question is: Was there a work stoppage in violation of the no-strike clause of the agreement?* This query requires an interpretation by the arbitrator of the extent of responsibility assumed by the defendant unions for work stoppages. Fundamental to answering this question is the determination whether unions stand as guarantors for every stoppage which occurs regardless of their responsibility, in fact, for its occurrence.

Major court and arbitration decisions prior to *American Manufacturing, Warrior* and *Enterprise Wheel,* had developed a body of precedent requiring that the interpretation and application of a no-strike clause be left to arbitration. These decisions took cognizance of the fact that the courts have no right to set the limits of a union's responsibility for a work stoppage in lieu of arbitration. They also reflected the accepted view of arbitrators that there are limits, the extent of which depends on contract interpretation and a hearing on the facts.

In *Signal-Stat.* v. *U. E.,* 235 F. 2d 298 (C. A. 2, 1956) cert. den'd 354 U. S. 911 (1957), the Second Circuit stayed the action and ordered the employer to submit the issue of the defendant-union's alleged breach of a no-strike clause to arbitration in a suit for damages by the employer for breach of a collective bargaining agreement.

The same view on the arbitrability of an alleged breach of a no-strike clause has been accepted by the Third Circuit prior to the recent decisions of the Supreme Court. The District Court of New Jersey in *Tenney Engineering, Inc.* v. *U. E.,* 174 F. Supp. 878 (D. C. N. J., 1959), ordered arbitration of a claimed breach of a no-strike clause in a suit for damages by an employee. The New Jersey District Court acted upon the direction of the Court of Appeals which had ruled that a stay was the proper remedy for suits brought under Section 301 of Taft-Hartley. See

Tenney Engineering Inc. v. *U. E.*, 207 F. 2d 450 (C. A. 3, 1953). The District Court's decision contains an excellent and concise statement why the undisputed occurrence of a work stoppage does not automatically presume union liability and, consequently, why arbitration is necessary:

> "Here, on the contrary, the Union alleges the strike or work stoppage was a wildcat affair, for which it had no responsibility. It is this very issue of responsibility for this strike or work stoppage which this Court has just found to be the proper subject of arbitration, not of litigation." (174 F. Supp. 878, 881.)

The Third Circuit's recent decision in *Yale & Towne* reinforced its earlier view of the effect of a no-strike clause in light of this Court's decision in *Warrior:*

> "'* * * we may also find an answer to the Company's contention that the strike constituted a material breach of the agreement, thereby excusing it from proceeding to arbitrate. That is made clear by what the Court said in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. at 579: 'The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.' * * * [t]he question here is not merely to determine whether a strike took place. Resolution of that question may well raise collateral problems involving past practices and recognized responsibilities of the parties insofar as a work stoppage is concerned. That, in turn, may require an examination of the bargaining history and grievance settlements, which admittedly we cannot do." (49 LRRM, 2652, 2654.)

The trial court in *Tenney* made specific reference to the Seventh Circuit's decision in *Cuneo Press,* 235 F. 2d 108 (1956). The opinion in *Tenney* points out that the only reason the Court of Appeals in *Cuneo* did not order the

alleged breach of a no-strike clause to arbitration was because the trial court * * * "found that the Union had in fact caused the strike which constituted the breach of the no-strike clause." (174 F. Supp. 878, 881.) We submit that such a determination of the merits of an arbitrable dispute by a court, coming *after American Manufacturing, Warrior,* and *Enterprise Wheel,* would be unquestionably violative of the Supreme Court's mandate.

The same result as *Signal-Stat* and *Tenney* was reached by the District Court of Connecticut in *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283,* 167 F. Supp. 817 (D. C. Conn., 1958), in which the question of a union's responsibility for a work stoppage in violation of a no-strike was ordered to be determined by arbitration. See also, *Lewittes & Sons* v. *United Furniture Workers,* 95 F. Supp. 851 (S. D. N. Y., 1951); and *Butte Miners' Union* v. *Anaconda Company,* 159 F. Supp. 431 (D. C., Mont. 1958) aff'd 267 F. 2d 940 (C. A. 9, 1959). *United Construction Workers* v. *Haislip Banking Co.,* 213 F. 2d 872 (C. A. 4, 1955), cert. den'd 350 U. S. 847 (1955), is a landmark decision establishing the principle that a union is not a guarantor for every work stoppage during the life of a no-strike agreement.

The above cited decisions are completely consistent and mirror the overwhelming view among labor arbitrators that there are limits to a union's liability for strikes under the most unqualified language employed in agreements not to engage in any form of work stoppage.

In *Signal-Stat* the no-strike agreement was almost identical to that contained in the subject contract between the plaintiff and the defendant unions. The agreement in *Signal-Stat* read:

> "During the term of this agreement there shall be no strikes, stoppages or lockouts for any cause or reason whatsoever * * *."

The no-strike clause in *Armstrong-Norwalk* was stated in even stronger language than either in *Signal-Stat* or the subject contract. The *Armstrong-Norwalk* clause read:

> "* * * the Union agrees not to engage, encourage, sanction, or approve any strike, stoppage, slow-down, or other interruption of work during the life of this agreement. *On the contrary, the Union will actively discourage any strikes, stoppage, slow-down, or other interruptions of work* in violation of the agreement." (Emphasis added.)

As in *Armstrong-Norwalk,* the contract in *Tenney* spelled out its responsibility not to cause a work stoppage and to restrain its members from taking such an action.

See the no-strike clauses interpreted and applied by arbitrators in the following cases: *Oregonian Publishing Co.,* 33 LA 574 (1959); *Baldwin-Lima-Hamilton Corp.,* 30 LA 1061 (1958); *Newark Newsdealers Supply Co.,* 20 LA 476 (1953); *Hoffman Beverage Co.,* 18 LA 869 (1952); *Canadian General Electric Co.,* 18 LA 925 (1952); and *Motor Haulage Co.,* 6 LA 720 (1947). These cases are discussed in detail below.

D. Whether or Not An Arbitrator Would Find that the Defendants have Violated the No-strike Clause and Award Damages, and Whether He Would have the Power to do so Is Conjectural and Involves a Premature Intrusion Into an Arbitrator's Jurisdiction.

The decisions of the courts below to withhold the dispute from arbitration cannot be justified because the Employer seeks damages. We have already demonstrated that a court cannot determine arbitrability by reviewing the merits of a controversy. The Supreme Court's decision in *Enterprise Wheel* makes it clear that a court cannot make an indirect judgment of a dispute by presuming

and then passing upon the remedy which would be ordered by an arbitrator should he find contract violation.

In *Enterprise,* a union sought specific performance of an arbitration award which reduced the discipline against employees who had participated in an unlawful work stoppage from discharge to a short term suspension. The trial court refused to enforce the award, holding that the arbitrator was limited to finding whether the employees had participated in a violation of the bargaining agreement as alleged by the employer, but not to varying the punishment for violation. The trial court upheld the employer's contention that the power of the arbitrator did not extend to reviewing remedies for contract violation because the agreement gave the arbitration jurisdiction to hear only "differences as to the meaning and application" of the terms of the agreement.

The rule of law set forth in the Supreme Court's majority opinion appears as an admonition to the courts not to conflict with the arbitrator's basically equitable function through a narrow construction of arbitration clauses:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." (363 U. S. 593, 597.)

See in accord *Machinists* v. *Cameron Iron Works,* 292 F. 2d 212, (C. A. 5, 1961), cert. den'd, 368 U. S. 926 (1961).

In determining the arbitrability of this dispute, the trial court should have given weight to accepted arbitration practice. It is significant that the majority of arbitrators as reflected in their reported decisions, have recognized that they have a wide range of remedial powers to

deal with union violations of their no-strike agreements. Many arbitrators have recognized their right to assess damages against a union as part of their power to afford relief for contract violations.

A recent decision by Arbitrator Paul L. Kleinsorge in *Oregonian Publishing,* 33 LA 574 (1959), is a prime example of the mainstream of thought among labor arbitrators.

In *Oregonian Publishing,* the company brought a grievance to arbitration against the union, alleging breach of the no-strike clause resulting from a short-lived work stoppage. The no-strike clause in this case followed similar lines as that found in the present action:

> "During the life of this agreement [the union] agrees not to strike and [the company] agrees not to lock out [the union]."

It is important to note that the contract clause which defined the arbitrator's jurisdiction in *Oregonian Publishing* used much more restrictive language than that contained in the Sinclair Refining contract. The *Oregionian* contract stated that the arbitrator "* * * has the power to decide all questions which may arise concerning the construction to be placed upon any clause of the contract or alleged violation of the contract." The union in *Oregonian* questioned the power of the arbitrator to decide the alleged contract violation and award damages. Consistent with the holding of the Supreme Court, Arbitrator Kleinsorge refused to place a narrow construction on contract language. He concluded that the power to determine questions of contract construction entails "the authority to decide *any* questions concerning contract violations such as those in the present case, including the question of damages." (33 LA 574, 585.)

The arbitrator in *Oregonian* also placed special import

in interpreting his powers on the fact that the contract contained no provision limiting his remedial powers. We underscore this point because no limitation appears in the agreement between the Employer and the Unions. See, *Newark Newsdealers Supply Co.*, 20 LA 476 (1953); and *Canadian General Electric Co.*, 18 LA 925 (1952) for the same result.

Arbitrator Hugh E. Sheridan in *Hoffman Beverage Co.*, 18 LA 869 (1952), awarded damages against a union upon the employer's claim of a no-strike clause violation. The arbitration and no-strike clauses were substantially the same in *Hoffman Beverage* as in the present case. This arbitration decision is also significant in that it is representative of the accepted view that not every work stoppage necessarily imposes liability upon the contracting union. The arbitrator assessed damages only after concluding that the two day walkout was not a spontaneous act of the employees and that they had been instigated and encouraged by the union shop steward.

Motor Haulage Co., 6 LA 720 (1947) was one of the earliest reported arbitration decisions which established the principle that union liability can only follow a factual determination of the extent of union responsibility for a work stoppage. In *Motor Haulage*, Arbitrator Hugh E. Sheridan ordered compensatory damages levied against the union for a two-day wildcat strike. The arbitrator cautioned, however, that the award must not be interpreted as sanctioning union liability for every work stoppage. The arbitrator's language could well be applied to the analysis of the issues of this litigation.

> "* * * [the arbitrator] does not believe that this union, or any organization for that matter, be it a labor organization or otherwise, should be held strictly accountable for all the personal, unrelated, and unauthorized acts of its individual members. Such a

rule of accountability is not only unreasonable but also unenforceable as a practical and legal matter." (6 LA 720.)

The *Motor Haulage* decision was subsequently ordered enforced by a state appellate court in *Motor Haulage Co.* v. *Teamsters,* 7 LA 953 (N. Y. Sup. Ct., App. Div., 1947). The court held, in response to the union's charge that the arbitrator had exceeded his authority, that a court cannot set aside an arbitrator's award "* * * for mere errors of judgment either as to the law or as to the fact."

In the present case, we submit by refusing to order arbitration the trial court, in fact, was substituting its judgment "as to the law" and "as to the facts" for that of the arbitrator's.

We do not contend that the trial court need have made a final determination of an arbitrator's right to award damages in deciding the arbitrability issue. We do maintain, nevertheless, the court went beyond its authority in denying the defendants' motion to stay by prejudging an arbitrator's power to award damages for violation. Certainly, the arbitration decisions cited above are in themselves sufficient authority to require arbitration of the present dispute. These decisions demonstrate that the court should have granted the stay under the rule for determining arbitrability set down in *American Manufacturing.* Whatever personal view of the merits a court may take, the Supreme Court directed that "[d]oubts should be resolved in favor of coverage."

If the Supreme Court holds that regardless of arbitration practice, alleged breaches of no-strike clauses (or of certain types of no-strike clauses) remain within the exclusive province of courts to decide, then, in effect, a precedent has been established conferring upon courts special authority to impose their interpretation of arbi-

tration clauses and to define the boundaries of an arbitrator's remedial powers. Before such a decision is made it should be recognized that it is near impossible to draw a definitive line which would keep the judiciary separated from the substantive issues of special classes of labor disputes. We submit, however, that such a decision would vitiate the commitment of public policy to encouraging the growth of arbitration. If the court's main function is to enforce arbitration, then the burden of limiting the arbitrator's jurisdiction must shift from the judiciary to the parties. Parties to bargaining agreements should be made clearly aware that all disputes under their contract will be arbitrated unless they insert unambiguous language in the arbitration clause excluding from arbitration well defined claims which may be brought by either side under specified provisions of the agreement. In this regard, note the recent decision of the District Court for the Eastern District of Pennsylvania in *I. B. E. W.* v. *Westinghouse Electric Corp.*, 198 F. Supp. 817, (E. D. Pa., 1961) in which arbitration was ordered because the bargaining agreement contained no specific exclusionary language. Cf. *Couch* v. *Prescolite Mfg. Corp.*, 191 F. Supp. 737, (W. D. Ark., 1961), where the court's standard of arbitrability was whether the contract "clearly and unambiguously" expressed an intention to arbitrate. This issue has recently been discussed by Richard Givens, *Sec. 301 Arbitration and The No-Strike Clause,* 11 Lab. L. J. 1005 (1960). See also, Comment, *Arbitration of No-Strike Breaches,* 31 Ind. L. J. 473 (1955).

CONCLUSION.

For the reasons above stated, the decision of the District Court denying the defendants' Motion to Stay should be reversed, and the judgment of the Court of Appeals set aside, the case remanded, with instructions that the relief requested by the defendants be granted.

II.

THE DISTRICT COURT SHOULD HAVE STAYED THE ACTION BECAUSE THE ISSUES RAISED BY THE COMPLAINT ARE PENDING BEFORE ARBITRATION.

A. The Employer's Claim of Liability for Breach of the No-Strike Clause at Law Raises Common Issues of Fact and Contract Interpretation and Application Which Have Been Raised by the Grievances Submitted to Arbitration Protesting the Right of the Employer to Discipline the Individual Defendants for Allegedly Committing the Same Breach.

In the preceding sections we have reviewed the holdings of the courts below that the alleged breach of the no-strike clause by the International and Local is not subject to arbitration. In addition to the above holdings, both the District Court and the Court of Appeals held that the action should not be stayed until arbitration of the pending grievances protesting the Employer's disciplinary action against the Local Officials for alleged participation and instigation of the work stoppage. This second basis for staying the action bears distinct consideration.

Even if one assumed *arguendo* that an arbitrator could not consider the question of damages against the defendant unions for breach of the no-strike clause, that does not mean that the determination of the responsibility of a con-

tracting union, its officials and members, or the employer's employees is not subject to arbitration. If this were not the case, the anomalous situation could occur of an arbitrator finding that a union and its agents did not violate the contract while a court finding they did commit a violation. Yet, this could well be the effect of the trial court's ruling.

In this regard, *American Smelting & Refining Co.* v. *United Steelworkers*, 271 F. 2d 802 (C. A. 7, 1959), which had been before the Seventh Circuit prior to the subject action, is a case in point which bears witness to the wasted time which can be imposed on litigants and courts when arbitration is not allowed to take its due course in advance of court action. After extensive arguments in the trial court and the Court of Appeals, *American Smelting* was dismissed by the parties following an arbitrator's award. As in the present suit, *American Smelting* involved a suit by an employer for breach of a no-strike clause against the contracting labor organizations and the individual local union officials. The defendants sought a stay, as in the subject action, pending a determination by an arbitrator of the right of the company to discipline the union officials. The stay was not granted by the trial court. While on appeal from the trial judge's order denying the stay, the arbitration award was rendered. The Court of Appeals, at that juncture, declared the appeal moot. From point of fact, however, the action terminated upon the award.

We now have the advantage of hindsight that much time and effort could have been saved in *American Smelting* if the parties had simply exhausted the arbitration processes before considering litigation. We submit that the experience gained from *American Smelting* bears direct application to this action.

The dilemma imposed by the lower courts' decisions is

apparent after a brief analysis of the relevant contract provisions. The basis of the cause of action against the unions and the individual defendants, as set forth in the Complaint, is violation of Article III, Section 3(1), the no-strike clause of the agreement, which reads:

> "Union further agrees that during the term of this Agreement there shall be no strikes or work stoppages: (1) for any cause which is or may be the subject of a grievance under Article XXVI of this Agreement * * *." (Complaint, I, Par. 5, R. 10).

The scope of the meaning of "grievances" as defined in Article XXVI has been discussed earlier in this brief. As we have previously outlined, the remaining sections of Article XXVI outline a detail procedure, progressing in stages, for resolving disputes between the parties up to the final recourse of arbitration. (Agreement between the parties, pp. 31-35; R. 19.)

The detailed procedures for adjusting employee grievances culminating, if necessary, in arbitration are self-evident. The Employer's cause of action circumvents these procedures in that it weakens the authority of the arbitrator who will be selected to hear the *pending* grievances between the parties.

It is apparent from the Statement of Facts that the allegations of liability against the union and individual defendants raise the same issues of fact and law which have been brought to arbitration under Article XXVI of the agreement. A simple comparison of the issues involved in this litigation and the pending arbitration demonstrates the truth of this conclusion.

In the suit for damages against the International and Local set forth in par. 7 of Count I, the Employer alleges that the unions violated the no-strike clause of their agreement because "* * * their officers, committeemen, and other

duly authorized and acting agents, caused a strike or work stoppage by approximately 999 of the approximate 1700 employees within the bargaining unit * * *." (R. 9.)

In the suit for damages against the individuals contained in par. 2 of Count II, the Employer identifies the individual defendants as the committeemen of the Local and the agents of the International who are responsible for the unions' alleged liability as set out in Count I. (R. 9.) The Employer's allegation of individual liability against the Local Officials is based on the same alleged breach of the no-strike clause as set forth in Count I. The Employer states in Count II, par. 9, that the defendants, "* * * individually and as officers, committeemen and agents of the said labor organizations (the International and Local) fomented, assisted and participated in a strike or work stoppage by approximately 999 of the approximate 1700 employees within the bargaining unit * * *." (R. 13.)

The same allegations of fact and liability contained in Counts I and II are repeated in Count III and are essential to the Employer's request for injunctive relief. (See Count III, par. 9(i), and par. 2 of the addendum to Count III, R. 16-18.)

A statement of the issues to be decided at arbitration was submitted to the trial court in the affidavit of the president of the Local. (R. 24.) The accuracy of the statement was not disputed by the Employer and is consistent with the affidavit of Sinclair Refining's industrial relations manager submitted subsequent to the Local president's statement. (R. 33.)

The affidavit of the Local president sets forth the issues required to be determined at the pending arbitration as follows:

> "(a) The illegality of disciplinary action taken against the below-named individuals as officials of Local 7-210, for allegedly fomenting, assisting and par-

ticipating in a strike or work stoppage, on February 13-14, 1959: A. F. Schilling, Sherman Moore, Samuel M. Atkinson, Zoltan Cziperle, John Reitz, Joseph Bundek, Charles Bainbridge, Mike Payer, Thomas F. Hicks, Dean Bainbridge, John J. Podraza, and Robert V. Dermody.

"(b) The illegality of the Company's action, as justified by the Company because of the aforesaid alleged illegal work stoppage, in restricting the activity, movements, and processing of grievances by members of the Grievance Committee of Local 7-210, pursuant to Article XXVI and other provisions of the aforesaid collective bargaining agreement."

The affidavit further stated that:

"The above-named individuals are the same named individuals who are parties defendant to a law suit filed by *Sinclair Refining Company versus Samuel M. Atkinson, et al.,* in the United States District Court for the Northern District of Indiana, Hammond Division.

"All the above-named individual defendants in the aforesaid lawsuit are members of the aforementioned Grievance Committee." (R. 24-25.)

The issue to be decided by arbitration is whether the Local Officials have in any way instigated or participated in the work stoppage in violation of their obligations under the bargaining agreement. This is the same issue raised by the allegations of the complaint.

An arbitrator is often called upon to decide the extent of responsibility, if any, of a local union officer for the occurrence of an unauthorized work stoppage. There has been uniform acceptance that this determination is the core of an arbitrator's task in reviewing the right of an employer to discipline an official for his alleged part in a work stoppage. A short resume of significant arbitration decisions which have passed on this discipline question will illustrate the complex factual issues which must be re-

solved and judged by an arbitrator in deciding whether a local official bears responsibility for a work stoppage.

In *Bamford Motor Coach Lines*, 32 LA 753 (1959), the arbitrator refused to uphold the discharge of a union representative who admittedly called employees off their jobs because of provocation by the employer in unjustly suspending a union official for attending to union business in violation of the agreement.

The arbitrator in *C. & D. Batteries, Inc.*, 16 LA 198 (1951), did not uphold discharge of union officers and stewards for a short-lived sitdown strike. The arbitrator failed to find sufficient evidence that the officials had instigated or encouraged the sitdown, although they did participate, along with the other employees, once it was under way.

The necessity for determining union officials' responsibility for a work stoppage is required in a review of all forms of disciplinary action, not only in discharge cases. The basic function of arbitration in this type of case was well stated by Arbitrator Harold M. Gilden in *Armour & Co.*, 8 LA 758 (1947). The Arbitrator held that local officials cannot be held individually liable and subject to discipline because they proved ineffectual in stopping a walkout:

> "Union officials cannot be looked upon as guarantors that the contract will not be violated. They are not subject to punishment in instances where the rank and file do not follow their advice. They are readily differentiated from Management executives who can exert persuasive authority through the threat of discharge. In contrast, the only authority vested in Union officials is that which they derive from the membership." (8 LA 758, 771.)

Responsibility for a work stoppage cannot be determined by a set of clearly defined logical rules. In making their

decisions, arbitrators must bring to bear an expert knowledge of the operations of a company. He must understand the facts of existence between union and management representatives. He must appreciate the background of their relationship and what common problems they share. He must form a judgment as to the degree of control and leadership over the work force which must reasonably be met by local union leadership and the degree of responsible supervision which has been assumed by management. See *Inland Container Corp.*, 36 LA 954 (1961). Judicial recognition of the arbitrator's experience and skills is particularly called for in this type of controversy. The Supreme Court's admonition to trial courts in *Enterprise Wheel* to assure arbitrators their due prerogatives is undoubtedly fit here. The trial court should have stayed this action so as to allow the arbitrator's "informed judgment to bear in order to reach a fair solution of a problem."

The expertise required of an arbitrator to resolve the issues inherent in the dispute between the parties is illustrative of the Supreme Court's recognition of the necessity to strengthen the arbitrator's jurisdiction over labor disputes. In *Warrior* the Court underscored this recognition of the arbitrator's role in placing specific reliance upon two of the leading exponents of broad and flexible labor arbitration jurisdiction in referring to Archibald Cox's article, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482 (1959) and Harry Shulman's article, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955) (363 U. S. 574, 578-9).

Cox forcibly stated the significance of the arbitrator's expertise to collective bargaining:

> "The inclusion of an arbitration clause shows a desire to commit such questions to a tribunal with the specialized knowledge and experience necessary to perceive

the substance which lies beyond dictionary definitions; this may be implicit in the collection of ideas even though there is no single phrase or sentence in which it finds expression. *And surely no collective bargaining agreement contemplates elaborate proof of its industrial context first in the suit to compel arbitration and later in arbitration.*" (p. 1515.) (Emphasis added.)

B. The Trial Court's Denial of the Motion to Stay Was, In Effect, a Refusal in Advance To Enforce the Eventual Decisions in the Pending Arbitrations Between the Parties.

This brief has demonstrated that the matters which have been brought to arbitration are basically identical with those of the complaint.

We submit that a judge is bound to follow and enforce the arbitrator's determination of these issues in any court proceeding between the parties. A court must give credit to an arbitrator's findings even if the remedies sought at law are not identical with those in question at arbitration. The principle of "res judicata" of arbitration awards or "estoppel by fact" is a necessary requisite to court enforcement of arbitration awards established by *Lincoln Mills*.

The Second Circuit's opinion in *Engineers Ass'n.* v. *Sperry Gyroscope Co.*, 251 F. 2d 133 (C. A. 2, 1957), cert. den'd 356 U. S. 932 (1958), is a leading decision expressing the binding effect of an arbitrator's determination of issues of fact and contract interpretation and application. In a suit by a union for breach of a collective bargaining agreement by an employer the Court of Appeals ordered the litigation stayed pending arbitration. Although the relief sought at arbitration was not the same as in the complaint at law the court reasoned that it was only required to

find an identity of issues raised in the two forums. The reasoning of the Second Circuit in *Sperry Gyroscope* finds complete support in the later decisions of the Supreme Court from *Lincoln Mills* to *Enterprise Wheel:*

> "* * * we have stated that after determining that the parties have entered into an arbitration agreement, the duty of the court is to determine whether *any* of the issues raised in the suit were within the reach of that agreement." (251 F. 2d 133, 137.)

See also *Refinery Employees* v. *Continental Oil Co.*, 268 F. 2d 477 (C. A. 5, 1959) cert. den'd 361 U. S. 896 (1959) in which the Fifth Circuit ordered specific performance of arbitration, although recognizing, rightly or wrongly, that the separate issues of damages could be subsequently brought to court based on the arbitrator's rulings on the issues of fact and law. Cf: The decision of the District Court for the Northern District of Indiana in *Petroleum Workers* v. *Standard Oil Co.*, 44 LRRM 2180 (N. D. Ind., 1959) in which the court ordered the arbitrator to take initial jurisdiction of a suit under Section 301 of Taft-Hartley. Foreshadowing the Supreme Court decisions a year later, the District Court did not attempt to determine the merits of the claim, but only decided that the issues raised in the complaint were arbitrable under the bargaining agreement between the parties. Cf: *Steelworkers* v. *Zweig & Sons*, 47 LRRM 2966 (N. D. Ind., 1961).

The court's responsibility to abide by and enforce an arbitrator's decision in all issues of law and fact is not a unique theory peculiar to the field of labor arbitration. This has been a basic precept of American Common Law since the Nineteenth Century. We see no reason why this established precedent should be weakened through a failure to apply it to the growing body of modern law governing labor disputes.

The fundamental concept of "res judicata" as applied to all forms of arbitration awards has been succinctly stated by Sturges, *On Commercial Arbitrations and Awards* (1930):

> "It is universally accepted that a valid award can be pleaded in bar of an action *upon any matter which was submitted and determined by the award.*" (p. 613 f.n. 260) (Emphasis added.)

The author took particular note of the growth of arbitration law in the State of New York.

The Federal judiciary, having been directed by the Supreme Court to develop a body of federal common law over enforcement of labor arbitration agreements and awards, would do well to look towards the lengthy New York experience in the enforcement of commercial arbitration. A landmark New York decision strikingly illustrates the application of the principle of *res judicata* to arbitration decisions. In *Springs Cotton Mills* v. *Buster Boy Suit Co.*, 88 N. Y. S. 2d 295 (1949), aff'd, 300 N. Y. 586, 89 N. E. 2d 877 (1949), a wholesaler sued a manufacturer for failure to deliver the remainder of an order after the wholesaler had refused the first shipment claiming that it was defective and unusable. Prior to the suit the manufacturer had recovered through arbitration the purchase price of the goods which had been delivered to the wholesaler. The manufacturer interposed the arbitration award as an affirmative defense. Based on the arbitrator's findings of fact, the manufacturer argued that it had the right to treat the contract with the wholesaler as rescinded and, therefore, was not obligated to deliver the remainder of the original order. The court upheld the manufacturer's defense. The court found that the arbitration necessarily resolved the issues raised in the complaint at law, although the parties were in opposite positions:

> "Since the arbitrators found that the material was of good quality, no damages may flow from the non-performance of a contract that had been cancelled by agreement between the parties." (88 N. Y. S. 2d 295, 299.)

In a recent decision the New York Courts have demonstrated the vitality of the *res judicata* principle developed under commercial arbitration as applied to labor disputes. *Nagle* v. *Brandenburg*, 30 LA 561, 183 N. Y. S. 2d 991 (Memo of Dec.) (1958), holds that an arbitration decision cannot be circumvented by a subsequent law suit which adds a conspiracy count to the misconduct unsuccessfully alleged before the arbitrator. This, in effect, is what the Employer is attempting by requiring the Local Officials to submit to two proceedings based on the charge that they had instigated and supported an unlawful work stoppage.

In *Nagle* an action by an employee was dismissed which charged conspiracy against his employer and union to deprive him of his employment. The defendants interposed an arbitrator's award which held that the employee had been discharged for cause. Although the arbitration had not directly involved the union, only the employee and employer, the court held that it was *res judicata* to the merits of the law suit. The court concluded:

> "It is clear from the award and judgment thereon that the matters in issue upon the first cause of action have been adjudicated and nothing remains for trial." (30 LA 561.)

The main precept which is at the foundation of the defendant's argument in support of their motion to stay is that there is an inevitable relation between a court's duty to enforce arbitration awards and to stay an action pending arbitration of issues raised by the complaint at law. The logic of this relationship was precisely defined by the

Second Circuit through Judge Learned Hand in a case under the Federal Arbitration Act:

> "* * * stay presupposes that the action shall not abate; and if it does not, it must go to judgment of one kind or another. If a defendant wins before the arbitrators, he must be able to clinch his victory by a judgment; on the other hand, having invoked arbitration, he must also abide the result, if he loses." *Murray Oil Products Co.* v. *Mitsui and Co.,* 146 F. 2d 381, 383 (C. A. 2, 1944).

CONCLUSION.

For the reasons above stated, the decision of the District Court denying the defendants' Motion to Stay should be reversed, and the judgment of the Court of Appeals set aside, the case remanded, with instructions that the relief requested by the defendants be granted.

III.

THERE IS NO CAUSE OF ACTION AGAINST THE LOCAL OFFICIALS IN THEIR INDIVIDUAL CAPACITIES

A. There Exists No Federal Cause of Action Against the Local Officials in Their Individual Capacities.

The Employer contends that the Local Officials are jointly and severally liable, in tort, for conspiring to and causing the breach of 999 individual employment contracts by participating in and instigating a work stoppage in violation of the no-strike clause of the Agreement between the International and Local.

The Employer's contention that union officers can be held individually liable has been primarily founded on a theory first advanced in Amended Count II of the Complaint in this action, which the trial court had refused leave to file. (R.

56-59.) The original Count II sounded in tort and simply alleged that the Local Officials had conspired to and did, in fact, cause a breach of the Agreement. After the trial court dismissed the action, the Employer sought leave to modify the basis of the cause of action against the individuals, alleging that by causing a breach of a collective bargaining agreement, the Local Officials had precipitated the breach of an individual employment contract for every worker who may have engaged in the stoppage.

In overruling the trial court, the Court of Appeals appears to have accepted the theory advanced by the Employer in Amended Count II. The Seventh Circuit reasoned that each employee who may have participated in the work stoppage violated a personal contractual obligation not to do so. (R. 74.) Thus, the Court of Appeals concluded that each of the Local Officials, as any other employee breached his own employment contract if he participated in the stoppage. Continuing from this point, and drawing upon common law tort principles, the Court of Appeals held that the Local Officials could be found personally liable for "* * * malicious interference with or inducement of breach of a contract * * *" in their role as employees and not as agents of their organization. (R. 76.) The Seventh Circuit's decision implies that whereas the Local Officials may not be third party tort feasors in relation to their organization's agreements, they are strangers to other employees' individual contract commitments. (R. 76.)

Essential to the Employer's theory is the proposition that a bargaining contract entered into by a union imposes personal civil liability for any individual in the bargaining unit who may participate in a breach of the collective agreement. We submit that such a proposition is unquestionably contrary to federal law and destructive of the purposes of collective bargaining which have been reinforced through

over twenty-five years of Congressional legislation. The trial court was not in error in dismissing Count II of the Complaint and thereby holding that only the defendant unions the contracting parties to the subject collective bargaining agreement, could be sued for an alleged breach. (R. 43-45.) We maintain that the reasons underlying the trial court's decision in dismissing Count II cannot be vitiated by the imaginary construction of 999 separate employment agreements.

There is no dispute that Section 301 of the Labor Management Relations Act allows neither a suit by or against an individual for breach of a collective bargaining contract. Under Section 301, the federal district courts have jurisdiction to entertain suits by or against labor organizations. In its first major decision under Section 301, the Supreme Court clearly held that the Court's power does not extend over individuals. *Westinghouse Employees* v. *Westinghouse Corp.*, 348 U. S. 437, 99 L. Ed. 510, 75 S. Ct. 488 (1955); See also *Morgan Drive-Away* v. *Teamsters,* 166 F. Supp. 885 (S. D. Ind., 1958) aff'd 268 F. 2d 871 (C. A. 7, 1959), cert. den'd 361 U. S. 896 (1959) for an application of the *Westinghouse* holding.

Following *Westinghouse,* added significance was given to Section 301 by the Supreme Court's holding in *Lincoln Mills,* in which the Court held that Congress meant the federal courts to fashion a body of substantive law in the enforcement of collective bargaining agreements. The Court, in so holding, interpreted the Congressional intent to create a positive and uniform federal policy for the enforcement of labor-management contracts. The Court rejected the idea that Section 301 was designed merely to make district courts alternative forums to state tribunals for the imposition of common law precepts over labor controversies. See Richard A. Givens, *Section 301, Arbitration and the No-*

Strike Clause. (Vol. 11 Labor L. J., p. 1005 (1960.) Comment, 62 Col. L. Rev. 364 (1962), commenting on the subject litigation.

B. Under the Holding of the Garmon and Dowd Decisions, Neither the State Courts of Indiana Nor the Federal Courts Under Diversity of Citizenship Jurisdiction Have Authority to Impose a Rule of Common Law Tort on the Defendant Union Officials for Their Alleged Participation In the Breach of a Collective Bargaining Agreement.

The trial court's jurisdiction over the Local Officials, in their individual capacities, is based on diversity of citizenship. Therefore, in considering whether tort liability can be imposed over these defendants, the District Court was required to place itself in the same position as an Indiana state court. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938). During the course of this litigation, the Supreme Court decided two major cases, which add significant weight to the conclusion that Sec. 301 preempts alternative state actions and remedies for breaches of collective bargaining agreements in interstate commerce. We submit that *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959); and *Charles Dowd Box Co.* v. *Courtney,* 49 LRRM 2619 (U. S. 1962), coming after this Court's decisions in *Westinghouse* and *Lincoln Mills,* directly support the trial court's finding that no common law action can lie against individual defendants for participating in the breach of their union's bargaining agreement.

In *Garmon* the Supreme Court held that a state court had no jurisdiction to award damages in tort to an employer for activity which might conflict with the juris-

diction of the National Labor Relations Board established by Congress.

The union, in *Garmon,* was accused of operating an unlawful picket line in violation of state common law. The Supreme Court held that the union's alleged conduct must first be considered by the N. L. R. B. since the activity may or may not constitute an unfair labor practice under federal law. The Court made it clear that the only requirement for withholding jurisdiction from state authorities is a determination that the labor controversey *might* come within the purview of federal authorities for adjudication.

The *Garmon* decision was not limited—it went beyond the necessary confines of the case. The entire emphasis of the decision was on the paramount importance which Congress has placed upon an integrated national labor policy. In the opening paragraphs of the decision, Justice Frankfurter, speaking for the Court, set the major theme of the Court's ruling. The language of the decision could well be applied to the present case:

> "The case before us concerns one of the most teasing and frequently litigated areas of industrial relations, the multitude of activities regulated by * * * the National Labor Relations Act * * *. These broad provisions govern both protected 'concerted activities' and unfair labor practices. They regulate the vital, economic instruments of the strike and the picket line, and impinge on the clash of the still unsettled claims between employers and labor unions. The extent to which the variegated laws of the several States are displaced by a single, uniform, national rule has been a matter of frequent and recurring concern * * *.
>
> "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures

and attitudes towards labor controversies." (359 U. S. 236, 241-243.)

The precedent established by *Garmon*, directly supports the District Court's holding in the present case. The Supreme Court has established the principle that the states cannot exercise powers which, in any way, interfere with or are dual to the *substantive* provisions of the Taft-Hartley Act. The employer's action against the defendant unions under Section 301 requires the application of federal *substantive* law under Taft-Hartley. If the action against the Local Officials is allowed to stand, this Court would be sanctioning the development of a dual system of state court litigation over breaches of collective bargaining agreements.

There is no dispute between the parties that the substantive allegations of liability against the defendant unions under Section 301 are identical to the allegations in tort against the individual defendants. *If the Supreme Court foresaw the conflict between established state law and the jurisdiction of the N. L. R. B., how can opposition between the power of the federal courts and state bodies be encouraged by approval of the novel form of action against union officials which has been proposed by the Employer?*

We submit that the recent holding of this Court in *Dowd* is the logical corollary to *Garmon* and foreshadows the decision necessary in this action. In *Dowd* the Supreme Court held that the state courts have concurrent jurisdiction with federal courts over actions for breach of collective bargaining agreements. However, in so holding, this Court acknowledged that Section 301 was "* * * more than jurisdictional * * * that it authorizes federal courts to fashion from the policy of our national labor laws, a body of federal law for the enforcement of agreements within its ambit." (49 LRRM 2620) *Lincoln Mills*. The Court accepted the authority of a state tri-

bunal to hear the action, but recognized that the state would be "* * * enforcing rights created by federal law." (49 LRRM 2621.) The Court's opinion on this point is particularly pertinent to the present issues because the complaint for breach of contract initiated in the state trial court apparently made no reference to federal legislation. The Supreme Court's decision indicates that Section 301, and resulting federal questions, was interjected for the first time by way of defense. The *Dowd* opinion, taken as a whole, demands the conclusion that a common law action arising out of a breach of a bargaining agreement requires the application of federal law under 301 by the state court.[2] See in accord: *Volunteer Electric Cooperative* v. *Gann*, 46 LRRM 3049 (Tenn. Ct. of App., 1960); *McCarroll* v. *Los Angeles County Dist. Council*, 49 Cal. 2d 45, 315 P. 2d 322 (1957), cert. den'd 355 U. S. 932 (1958); *Commercial Can Corp.* v. *Teamsters*, 160 A. 2d 855 (N. J. App. Ct., 1960); and *Broadway-Hale Stores* v. *Retail Clerks*, 48 LRRM 2967 (Cal. Dist. Ct. of App., 1961). A recent decision by the District Court for the Eastern District of Arkansas in *Central Metal Products* v. *U. A. W.*, 195 F. Supp. 70 (E. D. Ark., 1961), anticipated the ruling in *Dowd*. An employer filed a suit for breach of contract against a union in a state court under local common law. The union petitioned for removal to the federal court and the employer's request to remand for lack of a federal question was denied. Although the complaint did not recite federal law, the federal court assumed jurisdiction under Section 301, stating:

"* * * if [the] complaint, fairly construed, re-

2. We ask the Court to note that our brief, as respondents, was submitted in draft form to the Employer, as petitioner, pursuant to the Court's directives, subsequent to the *Dowd* decision, but, prior to *Teamsters* v. *Lucas Flour Company*, 30 LW 4167 (1962). Therefore, we do not deem it appropriate to discuss *Lucas Flour* at length. We do believe, however, that the latter decision completely supports our analysis of *Dowd* and the application of both these decisions to the present issues.

> veals that [a] cause of action raises a question of violation of a contract with a labor organization representing employees in an industry affecting commerce, as defined in the Taft-Hartley Act, where the plaintiff is, himself, an employer in such industry, then the action is removable although some of the particulars required for federal jurisdiction must be made plain in the petition for removal." (195 F. Supp. 70, 72.)

See also to same effect, *National Dairy Products* v. *Heffernan,* 195 F. Supp. 153 (E. D., N. Y., 1961).

C. A Valid Cause of Action Against the Local Officials Cannot Be Created by Substituting the Fiction of 999 Employment Contracts for the Collective Bargaining Agreement.

The Employer's theory of individual contracts, resulting from the bargaining agreement, is incompatible with the entire federal labor policy as interpreted and developed by the Supreme Court in its landmark cases since *Westinghouse.* We submit that if such a theory were accepted, the consequences which would flow, would be chaotic for the development of labor management relations. The growth of a uniform substantive law under Section 301, as envisioned in *Lincoln Mills* and *Dowd* would be impossible. Federal and state courts could be deprived of jurisdiction under 301, over disputes arising out of bargaining agreements by an employer bringing a so-called common-law action in a local state court against individual union members who are alleged to have been responsible for, or who had merely participated in an alleged contract violation. We do not quarrel with the contention that the relationship of members of a bargaining unit to their employer, are governed by the bargaining agreement entered into on their behalf by their union. We do

maintain, however, that the courts have universally recognized that there are certain rights and obligations in the agreement, which can only be understood in terms of the associative responsibility of the work force as members of their union organization. This understanding was basic to the Supreme Court's first major decision under Section 301 in *Westinghouse.* See for the same holding *Machinists* v. *Servel,* 268 F. 2d 692 (C. A. 7, 1959), cert. den'd, 361 U. S. 884 (1959).

Strictly speaking, the parties to the Agreement are the International and Local on the one hand, and Sinclair Refining Company on the other. The no-strike commitment in Article III of the Agreement is entered into by the Union, and in turn, the Employer agrees that there shall be no lockouts. (See Agreement, Article III, par. 1 and 2, R. 19.) See *NLRB* v. *Cummer-Graham Co.,* 279 F. 2d 757 (C. A. 5, 1960), in which the Fifth Circuit reasons that employees, individually, are not parties to a collective bargaining agreement unless specifically added in negotiations. See *Comment,* 62 Col. L. Rev., 364 (1962).

The fallacy in the Employer's argument of individual contracts is apparent upon a review of just some of the countless arbitration decisions dealing with local union officials' responsibility for participating in, or instigating, a work stoppage in violation of no-strike clause. If an employee breaches his personal employment contract, by participating in, or instigating a stoppage, then an employer surely should have the absolute right to terminate the employment relationship of any or all of the employees. However, it is an accepted premise in industrial relations that the extent of discipline up to and including discharge of an employee, is not a matter of personal contract, but subject to the grievance and arbitration provisions of the collective bargaining agreement. The arbitrator is usually called upon, in these in-

stances, to interpret and apply the bargaining agreement as it relates to each employee. Most agreements specifically limit the right of an employer to discipline employees. In every case, the arbitrator is called upon to determine whether the employee's conduct during a work stoppage warrants the discipline meted out by the employer. In addition to examining the employee's actions, the arbitrator will take cognizance of the conditions which might have precipitated the stoppage. The Court should note that the subject Agreement contains a typical disciplinary clause, qualifying the right of an employer to "* * * suspend or discharge for good and sufficient cause" and that "* * * such suspensions and discharges shall be subject to the grievance and arbitration clause * * *." (Agreement, Article XXXI, R. 19.)

A typical example of an arbitrator passing upon the right of an employer to discipline a local official in connection with a work stoppage, is seen in a recently reported arbitration by Jesse S. Williams in *Todd Shipyards Corp.* 36 LA 333 (1961). The arbitrator refused to uphold a discharge of a union steward with twenty-one years' service with the employer for alleged instigation of a work stoppage. The arbitrator reduced the discharge to a temporary suspension, weighing heavily on the limited role played by the official and the fact that other employees who participated in the stoppage were not in any way disciplined. The significant function of equitable considerations is exemplified by a decision of Arbitrator John Perry Horlacher in *Kaye-Tex Mfg. Co.*, 36 LA 660 (1960). Although Arbitrator Horlacher upheld disciplinary suspensions of some of the strikers who participated in a wildcat work stoppage, he clearly accepted the principle that the discipline could only be sustained if it is meted out in a non-discriminatory fashion. The arbitrator held that this principle was valid, even though the bargaining agree-

ment gave the employer specific authority to discipline no-strike clause violators as the employer saw fit.

It is also the general view of arbitrators that employees, who are local union officials, do not assume individual contractual obligations any more than their fellow workers. This fact should not be confused with the fact that the extent of their culpability as employees, may be affected because of their leadership role. This point was succinctly stated in a recent decision by Arbitrator Samuel S. Kates in *Hooker Chemical Corp.*, 36 LA 857 (1961), in which the arbitrator upheld discharges for some employees, and reduced others to temporary suspensions, as a result of a work stoppage. Arbitrator Kates refused to discharge local officers merely because of their union position, stating:

> "In the present case, the fact of holding office * * * has been taken into account by the arbitration board only to the extent that this fact would produce greater effect on the employees sought to be led or influenced by these officers in the wrongful acts which they were shown actually to have committed." (36 LA 857, 860.)

See one of the earliest reported decisions setting forth the above principles by Arbitrator Whitley McCoy in *Rheem Mfg. Co.*, 8 LA 85 (1947). Cf: Arbitrator McCoy in *Jones & Laughlin Steel Corp.*, 29 LA 644 (1957). Cf: Decisions of other arbitrators in *Bamford Motor Coach Lines*, 32 LA 753 (1959); *C. & D. Batteries, Inc.*, 16 LA 198 (1951); *Armour & Co.*, 8 LA 758 (1947); *Babcock & Wilcox Co.*, 29 LA 681 (1957); *Bethlehem Steel Co.*, 29 LA 635 (1957); and *International Harvester Co.*, 14 LA 986 (1950).

As an employer's action directed against an employee is subject to and channeled through the provisions of the bargaining agreement, so too are an employee's rights subject to the grievance and arbitration procedures of the agreement. According to the Employer's theory, an employee assumes personal contractual obligations by virtue of the

terms of the labor-management contract. If this were true, then an employee should have an unqualified right to resort to court action against his employer for breach of his personal employment contract. This is clearly not the case—if it were, development of the arbitration process would be near impossible. Cf: *J. I. Case & Co.* v. *National Labor Relations Board,* 321 U. S. 332, 88 L. Ed. 762, 64 S. Ct. 576 (1944) in which the Supreme Court reasoned that the only strictly "individual" relationship between an employee in a bargaining unit and the employer is when the former is hired and leaves employment.

The Seventh Circuit in *Kosley* v. *Goldblatt Bros., Inc.,* 251 F. 2d 558 (C. A. 7, 1958) cert. den'd, 357 U. S. 904 (1958), rendered a leading decision which draws a definite line between collective and individual undertakings by virtue of bargaining agreements. The court upheld the right of a discharged employee to sue, as an individual, his employer for back wages. The employee was not attacking the propriety of the discharge or seeking reimbursement for lost wages as a result thereof. The employer-defendant maintained that the employee was required to resort to the grievance and arbitration procedure before suit. The court stated that if the claim arose out of a dispute which involved the basic undertakings of the union and employer pursuant to the bargaining agreement the defendants' argument would be accepted. However, the court held that the question of back wages in this instance was sufficiently divorced from a collective bargaining dispute. It is of the utmost significance that the court specifically referred to the no-strike, no-lockout clauses of the agreement and the arbitration machinery as fundamentally a union-management undertaking:

> "The arbitration machinery is to operate on any dispute, controversy or question arising under the agreement which cannot be settled by discussion and negotia-

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> "The arbitration machinery is to operate on any dispute, controversy or question arising under the agreement which cannot be settled by discussion and negotia-

> tion between the parties. This provision follows an undertaking by the parties that there shall be no strikes, lockouts, stoppages or the use of any form of economic coercion by either party." (251 F. 2d 558, 560.)

Cf: *Owens* v. *Press Publishing Co.*, 20 N. J. 537, 120 A. 2d 442 (1956).

Consistent with the Seventh Circuit's holding in *Kosley* is the uniform authority that an employee does not have the absolute right to the use of the grievance and arbitration machinery of the bargaining agreement. The relationship of the Employer's claim for individual liability and the limitation of an individual's rights to process a grievance through the steps outlined in the contract was precisely set forth by the Wisconsin Circuit Court in *Fray* v. *Meat Cutters*, 32 LA 369 (Wis. Cir. Ct., 1959). In this case the state court dismissed a suit for damages by a union member against his local union for failing to process a grievance protesting his discharge against his former employer. The court held that the union member and his union were not divisible so that a suit between them could be maintained. The court emphasized the collective characteristics of the labor-management contract and the common purposes of the union and its membership:

> "* * * when [the local union] acted, or failed to act, it was doing so for the mutual benefit of all of its members. The members are engaged in a joint enterprise * * *."

The necessity for limiting direct action by an individual member for the sake of organizational cohesiveness was realistically set forth by the Court of Appeals for the Sixth Circuit by its recent opinion in *Union News Co.* v. *Hildreth*, 295 F. 2d 658 (C. A. 6, 1961). The court sustained a dismissal of a suit by an employee, in his individual capacity, against the employer for discharge without just

cause in violation of the bargaining agreement. Prior to the commencement of the action, the union had concurred with the employer that the discharge was justified. In dismissing the action, the court quoted Archibald Cox in Vol. 69, Harv. L. Rev. 601, 657:

> "In my judgment the interests of the individual will be better protected on the whole by first according legal recognition to the group interest in contract administration and then strengthening the representative's awareness of its moral and legal obligations to represent all employees fairly than by excluding the union in favor of an individual cause of action. Consequently, I would lean toward finding such an intention in an ambiguous agreement." (quoted at 295 F. 2d 658, 667.)

See *Parker* v. *Borock*, 148 N. E. 2d 324 (N. Y. Ct. of App., 1959); *In re Brettner*, 29 LA 345 (N. Y. Sup. Ct., 1957); *Arsenault* v. *General Electric Co.*, 29 LA 655 (Conn. Sup. Ct., 1957); and *Terrell* v. *Machinists Ass'n*, 150 Cal. App. 2d 24, 309 P. 2d 130 (1957), for the same result. Cf. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 97 L. Ed 1048, 73 S. Ct. 681 (1953); *Lamon* v. *Georgia Southern & Florida Railway Co.*, 212 Ga. 63, 90 S. E. 2d 658 (1955).

D. The Garmon Decision Is Directly Applicable to the Suit Against the Individual Defendants In That Their Alleged Conduct May or May Not Be Protected Activity Under the Labor Management Relations Act.

In the preceding sections of this brief, we pointed to the impact of the *Garmon* decision as part of the growing doctrine of federal preemption over labor disputes encompassed by Congressional action. *Garmon* dealt with the specific instance of a conflict of jurisdiction between the NLRB and state courts. The Supreme Court ruled that the preemptive powers of the federal court had been

breached when the California state courts imposed civil liability against a union for picketing. The Supreme Court held that since the picketing *may* be protected or unprotected activity under Taft-Hartley, the state could not act until the issue was resolved by the appropriate federal authority. The defendants maintain that the broad principles of *Garmon* control this action because of the conflict between federal substantive law under Section 301 and state tort law. As an additional consideration, the defendants also contend, apart from the conflict with Section 301, that the action against the Local Officials as individuals conflicts with the NLRB's power to determine whether their action was protected or unprotected activity and the extent to which the Employer can single them out with responsibility for the work stoppage.

Inherent in the Employer's action against the Local Officials is the supposition that state courts, or federal courts under diversity jurisdiction, can be given primary authority to limit the right of a man to strike. The proposed Amended Count II to the Complaint is based on an alleged individual violation of an obligation not to strike which runs to every member of the bargaining unit.

The Court can certainly take judicial notice of the fundamental guarantee to a worker of his right to refuse to work under protest to his employer under Section 7 of the National Labor Relations Act. We submit that it is not the responsibility of the courts to determine at what point the exercise of this individual right is unprotected so as to sanction retaliatory actions against him.

The NLRB has consistently passed upon the right of an employer to discharge or otherwise discipline employees who are local union officials as an outgrowth of their conduct in the course of a work stoppage during the term of a no-strike clause. These NLRB decisions have generally

risen from one of two types of issues under Sections 7 and 8 of the National Labor Relations Act, *viz*: 1) Whether the work stoppage, itself, was protected activity because it was in response to a prior unfair labor practice committed by the employer; or 2) whether the employer has committed an unfair labor practice under Section 8 by disciplining employees who are local union officials for their alleged part in the stoppage.

The existence of NLRB jurisdiction over both types of issues conflicts with a common law tort action against the Local Officials under the rule of law established in *Garmon*. Under the standards unequivocally set down in *Garmon*, a court need only conclude that the action before it involves conduct which *might* be protected activity under the federal legislation. The heart of *Garmon* was the Court's conviction that potential conflict arising from the resolution of labor disputes between common law tort actions and the NLRB must be avoided in the interest of a developing national policy. The application of this principle to the action against the Local Officials is inescapable after a review of some of the disputes which are considered by the NLRB.

The landmark decision of the Supreme Court in *Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U. S. 270, 100 L. Ed. 309, 76 S. Ct. 349 (1956) is, in itself, sufficient authority for our position. The Court conclusively held that not every work stoppage by employees during the life of a no-strike agreement was unprotected activity under Section 7. The Court held that the NLRB could enforce unfair labor practice charges against an employer for taking retaliatory action against employees who had participated in a walkout contrary to the no-strike clause of the bargaining agreement. The NLRB had found that unfair conduct by the employer in precipitating the work stoppage prevented unfair discipline of the men who had participated in the stoppage.

Mastro reflects a long history of NLRB adjudication of the first type of issue set forth above. Cf: *Mine Workers and Westmoreland Coal Co.*, 117 NLRB 1072 (1957) rev'd. in part, 258 F. 2d 146 (CA, D. C., 1958); and *Mine Workers and Boone County Coal Corp.*, 117 NLRB 1095 (1957) rev'd. on other grounds, 257 F. 2d 211 (CA, D. C., 1958), in which the Board found in both cases that the union caused a strike in violation of a no-strike clause. Cf: decision of Kansas Supreme Court in *Local 774* v. *Cessna Aircraft Co.*, 185 Kan. 183, 341 P. 2d 989 (1959), and Washington Superior Court in *Tacoma Union* v. *Puyallup Tribune*, 49 LRRM 2230 (1961). In *Mastro* the question before the Board was whether the work stoppage, in itself was protected activity. *Stockham Pipe Fittings Co.*, 84 NLRB 629 (1949), was one of the Board's first decisions dealing with the second kind of issue. In this case, the Board passed on the question whether an employer had committed an unfair labor practice by disciplining an employee, who was a local union officer, for allegedly instigating a work stoppage in violation of a no-strike clause. In the *Stockham Pipe* type of situation, the issue of the extent of a local official's responsibility for a stoppage must be passed upon by the Board in condoning or forbidding the employer's imposition of punishment against him.

A review of NLRB decisions just in the past year, demonstrates the vitality of the *Stockham Pipe* issue. In *General Motors Corp.*, 48 LRRM 1368 (1961) the Board held that the employer committed an unfair practice in discharging a local union committeeman for instigating a stoppage in violation of a no-strike clause. The Board found that although the committeeman engaged in the stoppage after it began, he did not, in fact, instigate or have any control over its beginning. The employer had not disciplined other employees who had participated in the stoppage, but had

singled out the committeeman for dismissal solely because of his local union position. The Board reasoned:

> "The issue involves not only the right of [the committeeman] but of all other employees similarly situated to be free from employer discipline for their union activity." (48 LRRM 1368, 1369.)

Cf: Other NLRB recent decisions passing on the same issue as in *General Motors;* in some cases the Board finding employer disciplinary action against local officials justified and in others not: *Denver-Chicago Trucking Co.,* 48 LRRM 1524 (1961); *Russell Packing Co.,* 48 LRRM 1608 (1961); *Arlan's Department Store,* 48 LRRM 1731 (1961). Cf: Earlier decisions of the NLRB involving the same issue in *W. L. Mead, Inc.,* 113 NLRB 1040 (1955); *Plasti-Line, Inc.,* 44 LRRM 1148 (1959).

It may be argued that our position is inconsistent because we maintain, on the one hand, that tort actions cannot be allowed in contravention of NLRB jurisdiction, yet we do not disapprove parallel jurisdiction by arbitrators. The argument may be made that the reasons advanced why actions against individual defendants conflicts with Board jurisdiction are fundamentally the same as those made in Section I of this Brief that this action should have been stayed until the pending arbitrations between the parties over the discipline of the Local Officials has been held. In refutation, we submit that arbitration by agreement of the parties is truly a horse of a different color than a civil law tort action. We have already emphasized that Section 203(d) of the Labor Management Relations Act declares a Congressional policy in favor of resolving disputes under bargaining agreements "by a method agreed upon by the parties * * *." In light of Section 203(d) the NLRB, on its own initiative, has either stayed or dismissed proceedings before it in lieu of the mutual desires of the parties to resolve their differences by arbitration. We recom-

mend an excellent summary of the foregoing NLRB policy by Bernard Samoff, Chief Labor Management Relations Examiner for the Board in *The N. L. R. B. and Arbitration, Conflicting or Compatible Currents,* Vol. 9 Lab. L. J. 689 (1958).

The Court of Appeals for the Fifth Circuit has given judicial recognition to the Board policy on arbitration in *Machinists* v. *Cameron Iron Works,* 257 F. 2d 467 (C. A. 5, 1958), cert. denied, 358 U. S. 880 (1958). In this case a union petitioned a district court for specific performance of the arbitration clause of their bargaining agreement. The employer-defendant argued that because allegations of the Complaint involved issues which could be raised as unfair labor practice charges, the NLRB had sole jurisdiction of the matter in the first instance. The Fifth Circuit ordered specific performance in recognition of the NLRB policy favoring arbitration. See discussion of NLRB policy in *General Motors Corp., supra*; and in decision by Arbitrator Harry J. Dworkin in *International Breweries,* 37 LA 639 (1961).

In upholding the right of action against the Local Officials, the Seventh Circuit in its opinion relied on *Baun* v. *Lumber and Saw Mills Workers Union,* 46 Wash. 2d 645, 284 P. 2d 275 (1955). (R. 76.) We submit that the rule of law employed by the state court in *Baun* cannot survive *Garmon.* The state court upheld the right of a plant superintendent to bring a tort action against local union officials for conspiring to deprive him of his position. The action did not involve breach of a collective bargaining agreement. The Court sustained the right, albeit the conduct alleged in the complaint against the officials could have been protected activity under Section 7 of the Labor Management Relations Act. Under the principles set down four years later in *Garmon* state courts today could not

entertain a lawsuit based on conduct which might be protected by federal law.

We recommend to the Court's attention, an article by Harry H. Wellington in Vol. 26 U. of Chicago L. Rev. 542 (1959) entitled *Labor and the Federal System*, which clearly states the necessity that civil suits arising from breach of collective bargaining agreements be kept within the confines of the rights of action created by Section 301 of Taft-Hartley. The author recognizes this requirement if the uniform labor policy created by Congress is to be effectuated. The article reasons that this conclusion is the logical synthesis of the rulings of the Supreme Court in *Lincoln Mills* and *Garmon*. Wellington first substantiates our understanding of the *Garmon* decision as it relates to individual liability for participation in union activity:

> "* * * Congress has created a board to construe the federal statute in the first instance. Federal purpose demands exclusive primary jurisdiction in an expert body, the N. L. R. B. To allow a state court to make the initial determination of the federal question is to undercut this federal purpose, and it is a mistake to think that the availability of eventual—or perhaps potential * * *—Supreme Court review is a cure." (p. 551.)

The author went on to deal directly with the jurisdiction to determine whether a no-strike clause has been violated. The article emphasizes the conflict which will inevitably result if state courts are allowed to exercise their multifarious control over any form of strike activity:

> "If state substantive law were to survive *Lincoln Mills*, some direct interference with Section 7 rights occasionally might occur. For example, suppose under state law a state court awards an employer damages, holding that a strike is in violation of an implied 'no-strike' provision in a contract. Suppose further that under federal law the 'no-strike' provision would not

have been implied, and that therefore, the strike was a protected activity under Section 7. If this sort of conflict were frequently to occur, it would be unfortunate indeed." (p. 557.)

Cf: Comment, Volume 58 Michigan L. Rev. 288 (1959) in which the author points out that the passage of the recent amendments to the Labor Management Relations Act by the 86th Congress did not in any way curtail the broad dictates of the *Garmon* decision. Cf. Comment Vol. 42 Minnesota L. Rev. 1139 (1958), in which the author supports the premise that a work stoppage during the term of a no-strike clause can entail or in itself be considered protected or unprotected activity or an unfair labor practice under Taft-Hartley.

E. There Is No Allegation of Tort Liability Against Any of the Defendants Other Than Their Alleged Instigation of and Participation In the Work Stoppage.

In order to avoid any confusion of issues on this appeal, the Employer at no time has alleged any "* * * torts, or conduct marked by violence and imminent threats to the public order * * *" against the defendant union officials. *Garmon*, 359 U. S. 236, 247. The Supreme Court in *Garmon* recognized that state courts still have jurisdiction over torts of violence which may be committed by individuals over and apart from their part in the collective activity involved in a labor controversy.

None of the three Counts of the Complaint or Amended Count II contain any allegations of violent torts against any of the defendants. (See, in particular Ct. I, para. 7, R. 11; Ct. II, para, 9, R. 13; Ct. III, para. 9, R. 14-15; and Amended Ct. II, para, 9, R. 56.) See Comment Vol. 35 St. John's L. Rev. 85 (1960); and Vol. 44 Va. L. Rev. 1337 (1958).

F. The Complaint Does Not Allege an Action in Tort Against the Local Officials Which Would Be Cognizable Under the Indiana Common Law.

Since the action against the Local Officials is based on diversity of citizenship, there is no dispute that the suit presupposes a right of action in tort according to the law of Indiana. We submit that the total impact of congressional action as interpreted and applied by Supreme Court decisions and NLRB policy which we have reviewed, demonstrate that the Employer's artfully created fiction of individual employment contracts cannot be made a creature of Indiana common law.

Individual contracts, if such did exist, would have to be a direct outgrowth of a collective bargaining relationship which has been given life and nourished by federal statutes. Whatever benefits and obligations the employees at Sinclair Refining Company derive by virtue of the International and its agents signing an agreement with their employer is the result of a chain of events initiated or sustained by federally created rights and obligations. The right of the International and Local to attempt to organize the workers at Sinclair was guaranteed by Section 7 of the Labor Management Relations Act; the Employer's obligation to recognize the union as the *exclusive* bargaining representative for certain defined categories of its employees was determined by the NLRB at a hearing, followed by an election conducted by the Board under Sections 3, 9, 10 of the Act; the obligation of the International and Local to represent *all* of the employees in the bargaining unit (regardless of any employee's personal desires to the contrary) is imposed by Section 8 of the Act; and the mutual obligation on the Employer and International and Local to sit down with each other and bar-

gain towards agreement was required under Section 8 of the Act. After all of these steps have been taken, we reach the Employer's contention that the State of Indiana has developed a common law action which recognizes individual employment contracts as the culmination of the aforesaid collective bargaining history.

The Employer's theory is particularly inappropriate as applied to the State of Indiana. Indiana is one of the nation's "right-to-work" states which has made it a criminal offense by statute for any person or organization to require union membership as a condition of employment. (Vol. 8, Part 1, Burns' Rev. Stat. Sec. 40-2701.) Under federal law, therefore, the International and Local are required to represent all employees in the bargaining unit regardless of whether they have chosen not to belong to the union. The Employer has not alleged in its Complaint who, if any, of the 999 alleged participants in the work stoppage were union members and who were not. Complaint, Count II, par. 9 (R. 13), Amended Count II, par. 9 (R. 57-58.) Presumably, from the Employer's point of view, individual contracts are imposed on the employees within the bargaining unit regardless of union membership. If this is the case, then surely the theory of liability could only have been gleaned from federal law.

A review of common law precedents supports our position that the District Court was correct in concluding that "* * * union members or officers cannot be held individually liable for acts of the union * * *." (R. 44.) We respectfully submit that the Court of Appeals was in error in relying upon the tort doctrine of *Lumley* v. *Gye*, 2 El. and Bl. 216, 118 Eng. Reprint 749 (O. B. 1853) (R. 74). The law of malicious interference by a stranger with a third party's

contract is inappropriate to conduct among fellow workers and union members.[3]

In its Memorandum of Decision the District Court cited two decisions which demonstrate the application of accepted common law principles to the breach of a union agreement. *Hicks* v. *Haight*, 171 Misc. 151, 11 N. Y. S. 2d 912 (1939) clearly sets forth the common law rule. (Cited in Memorandum of Decision, R. 44.) The New York State courts have had a long history of passing upon the question of holding an agent liable in tort for breach of contract by the principal upon the theory that the agent induced the breach. The New York decisions are uniform in holding that no such cause of action exists under the American or the earlier English common law.

In *Hicks* "[t]he question presented is whether directors and officers of a corporation, acting in their representative capacity are to be held liable for procuring a breach of contract by the corporation." (11 N. Y. S. 2d 912, 916.) This is basically the same question which is presented by this appeal. *Hicks* bears even more directly on the present issues in that the decision passed upon defendants' motion to dismiss the complaint.

The New York court dismissed the action against the corporate agents in their individual capacities. The decision distinctly drew the line between contract and tort actions:

> "The briefs do not refer to any case in which an attempt was made to hold the members of a directorate liable on that theory for having caused their corporation to breach its contract. Such an extension of the

3. We invite the Court's attention to an excellent discussion of the history of *Lumley* v. *Gye* as the doctrine of that decision was applied by American courts in the late 19th Century to the development of injunctions against organizing activities by the budding industrial labor organizations. Charles O. Gregory, *Labor and the Law* (2nd Rev. Ed., 1961 Norton) pp. 94-95 and 174 *et seq.*

> doctrine would tend to leave the directors open to tort claims whenever the corporation failed to perform a contract. * * * But even were directors to be held liable for so conducting their corporation as to cause it to fail to perform its contract, it is probable that they would not be held personally liable where the promisee could enforce full satisfaction of a judgment obtained in an action against the corporation for breach of contract." (11 N. Y. S. 2d 912, 916.)

The reasoning of the New York court starts with the elementary principle that an agent does not assume personal responsibility for a contract entered into by his disclosed principal or by him on behalf of his disclosed principal. *Williston on Contracts,* Rev. Ed. 281, I, 826; *Restatement of Agency,* Sec. 320; and Vol. 3, C. J. S., *Agency,* Sec. 215. The state court's analysis demonstrates not only that there is no tort action against union agents but the conflict of such an action with Section 301. The unions, as corporations, have no independent life aside from the officials, agents and members which compose the organization. If a union is to be charged with breach of contract, it can only be done so by acts committed by the officials, agents and members, as a breach of contract by a corporation is committed by its officials, agents and members. See Sec. 26 ALR 2d 1270 for a summary of the principles set forth in the *Hicks* case; and a comment in 43 Cornell L. Quarterly 55 (1957) entitled *Liability for Inducing a Corporation to Breach Its Contract.*

A recent decision by a New York court reaffirms that union and corporate officials are mirror images of each other in the eyes of the common law. *In re Rosenblum,* 36 LA 946 (N. Y. Sup. Ct., 1961.) A union brought an action against the president of a small, closely held corporation seeking the court to order the defendant to arbitrate a dispute under their collective bargaining agreement. The

court dismissed the action on the basis that the individual defendant could not be held personally responsible for the commitments of his corporate organization. The court's summary of the common law as it relates to collective bargaining is quite pertinent:

> "Where there is a disclosed principal-agent relationship and the contract relates to a matter of the agency, the agent will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal.
>
> "The fact that [the defendant] might have been aware of the lack of protection afforded to the workers by an agreement signed only by the corporation does not estop him from asserting the claim that he is not personally bound by the arbitration agreement." (36 LA 946, 947.)

Cf: *Mencher* v. *Weiss*, 306 N. Y. 1 (1953) where the court, applying the same principles as in *Rosenblum* found that the collective bargaining agreement did explicitly spell out a commitment by the officers of the corporation to bind themselves personally. This was an action by a union for unpaid health and welfare payments from an insolvent business.

During the course of arguments in the trial court the defendants' position received forceful affirmation by a decision of the District Court for Iowa in *Wilson and Co.* v. *United Packinghouse Workers*, 181 F. Supp. 809 (D. C. Iowa, 1960.) This decision was cited by the trial judge in its Memorandum of Decision (R. 49) and crystallizes the relationship between common law principles and suits for breach of collective agreements under Section 301.

The Court in *Wilson* held that a common law action against twenty-four local union officials for their active instigation of and participation in a work stoppage in violation of a no-strike clause circumvents the exclusive

remedy for breach of collective bargaining agreements under federal law. The suit against the individuals had been joined in an action against the international and local unions under Section 301.

The District Court in *Wilson* held that there was no substantive distinction between the so-called "tort" action against individual officials and a suit for breach of a bargaining agreement under Section 301. The Court stated:

> "[*The employer*] *alleges that the acts complained of were done pursuant to conspiracy. Technically speaking, there is no civil action for conspiracy.* * * * *allegations that the tortious acts complained of were committed pursuant to a conspiracy neither add to nor detract from a complaint in a civil action.* * * * *it is not the conspiracy, but the wrongful acts causing damage which are civilly actionable.*" (181 F. Supp. 809, 819-20.) (Emphasis added.)

We submit that the Seventh Circuit's distinguishing of *Wilson* is not justified. The Court of Appeals' opinion suggests that there is no reason to dismiss the action against the individuals until the allegations that they caused the work stoppage are proved or rejected. (R. 75-76.) This position presumes acceptance of the Employer's basic thesis that the Local Officials can be held personally liable for breach of the no-strike clause. The fact of the matter is that if the Local Officials did not instigate the stoppage as agents of the International or Local, their principals stand liable under the allegations of Count I of the Complaint.

The *Hicks* and *Wilson* decisions are consistent with established common-law precedent.

Wilson's synthesis of the common law and Section 301 was foreshadowed by the Court of Appeals for the Fourth Circuit in *Friendly Society of Engravers and Sketchmakers* v. *Calico Engraving Co.*, 238 F. 2d 521 (C. A. 4,

1956) cert. denied 353 U. S. 935 (1957), decided before *Lincoln Mills* and *Garmon*. In this case a union brought an action sounding in tort against an employer for malicious interference with the collective bargaining agreement by encouraging employees to overthrow the union as their bargaining representative. The Court held that there was no recognizable cause of action in tort for "malicious interference" with an agreement by a party to the agreement. The Court went on to hold, as in *Wilson*, that the union's only action against the defendant must be brought under Section 301 since "[t]he National Labor Relations Act and the Labor Management Relations Act * * *provide exclusive remedies for the protection of the rights thus recognized." (238 F. 2d 521, 523.) In accord, see *National Warehouse Corp.* v. *Ranney*, 44 LRRM 2923 (Wis. Cir. Ct., 1959), and *Thayer Co.* v. *Binnall*) 82 F. Supp. 566 (D. C. Mass., 1949). *We are unable to find any precedent under Indiana law which supports the conclusion that an agent can be held responsible in tort for the breach of a contract of his principal.* Our position is borne out by the decision of the Court of Appeals for the Seventh Circuit in *McNamar* v. *Baltimore & Ohio Chicago Terminal R. R. Co.*, 254 F. 2d 717 (C. A. 7, 1958), in which the Court assumed that under Indiana law that one who maliciously interferes with a contract must be a third-party stranger to the contractual relations before a tort action can be sustained against him.

Cases in which an agent or officer of a corporation have been held individually liable in tort are based on a charge and finding of predatory acts for the defendant's self-interest. These decisions were rendered only after a showing that the agent's action in causing destruction of his principal's contract were motivated out of purely personal gains in opposition to his firm. *Cf. W. P. Iverson & Co.* v. *Dunham Mfg. Co.*, 18 Ill. App. 2d 404, 152 N. E. 2d 615

(1950); *Wade* v. *Culp*, 107 Ind. App. 503, 23 N. E. 2d 615 (1939), cited in Seventh Circuit's opinion. (R. 74.) It is apparent from Count I of the Complaint that the alleged liability of the International and Local is based on actions by the union officials on behalf of their principal—organization.

CONCLUSION.

The Petitioners respectfully urge that the Decision of the District Court dismissing Count II of the Complaint in this action be affirmed and the Judgment of the Court of Appeals be set aside.

RESPONDENTS' ARGUMENT IN CASE NO. 434.

IV.

THE DISTRICT COURT WAS NOT IN ERROR IN DISMISSING THE ACTION FOR AN INJUNCTION.

A. An Injunction Covering Possible Labor Disputes In the Future Would Be In Violation of the Federal Anti-Injunction Legislation.

In Count III of the Complaint, the Employer sought a permanent injunction operating only *in futuro* against the International; the Local; and the Local Officials, in their individual capacities; and all present and future members of the bargaining unit at the Employer's East Chicago refinery from in any way interfering with normal employment or production in connection with any dispute which might be subject to the grievance and arbitration provisions of any future collective bargaining agreement between the Employer and the Unions. (R. 17-18.)

In addition to the allegations of the first two counts of the Complaint, the Employer alleged in Count III incidents dating back to July 1, 1957, which are said to all have amounted to violations of the no-strike clause of the then current bargaining agreement. (R. 15-16.) The Employer's allegations must be read in light of the uncontroverted affidavit of the Local President which was received by the trial court. (R. 24.) The Local President's affidavit verified that practically all of the disputes alleged in Count III have been settled by the Employer and the Local through their grievance and arbitration machinery, and that the remaining elements of conflict are in the process of settlement or resolution through the same mechanism.

Federal court jurisdiction over Count III was invoked against the Local Officials under diversity of citizenship and against the International and Local pursuant to Section 301. Insofar as the injunction suit asserts a separate cause of action against the Local Officials, the preceding arguments relative to Count II of the Complaint apply with equal force to Count III. However, aside from the questions already considered in this brief, Count III presents new issues of far reaching seriousness.

The overriding issue presented by Count III, is whether Section 301 of the Labor Management Relations Act has granted the federal courts power to anticipate and enjoin possible future conduct in connection with labor disputes which may arise under bargaining agreements not yet negotiated. We submit that no such grant of authority can be read by implication into Section 301 so as to circumvent or to effect a partial repeal of the federal anti-injunction legislation.

Since 1914 and the passage of the Clayton Act, 38 Stat. 738, 29 USC, Sec. 52, it has been the policy of the national government that no federal court shall cause an injunction to issue in any labor dispute. The Clayton Act specifically provides that no restraining order may issue prohibiting the right of persons, "* * * *singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do* * * *" (29 U. S. C. Sec. 52) (Emphasis added). The broad principle established in Clayton was expanded and reinforced in the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., Sec. 101, so that the prohibition against injunctions was extended to all forms of labor disputes, including those between a union organization and employer. The Employer seeks to supplant this entrenched Congressional policy through judicial fiat.

This Court is keenly aware of the existing conflict between the Courts of Appeal as to whether the Clayton and Norris-LaGuardia prohibitions extend to work stoppages *in progress* which are alleged to be in violation of a bargaining agreement. The Tenth Circuit in *Chauffeurs, Teamsters and Helpers* v. *Yellow Transit Lines,* 282 F. 2d 345 (1960), cert. granted 364 U. S. 931 (1961), affirmed an injunction by a district court against continuing picketing by a union, which activity was found to be in violation of a current no-strike provision. The Tenth Circuit reasoned that the right to issue the injunction was implicit in Section 301, and therefore, beyond the purview of Norris-LaGuardia. The *Yellow Transit* decision is directly contrary to the ruling of the Second Circuit in *A. H. Bull Steamship Co.* v. *Seafarers' International Union,* 250 F. 2d 326 (1957) cert. den. 355 U. S. 932 (1958). The Second Circuit held that Norris-LaGuardia forbade the issuance of an injunction against a *pending* work stoppage which the employer had alleged to be in violation of a no-strike provision.

Conflicting decisions of the Tenth and Second Circuits have squarely raised the issue whether an on-going work stoppage during the term of a no-strike clause of a current bargaining agreement is (1) a "labor dispute" under the anti-injunction legislation and if so, (2) whether Section 301 has repealed the coverage of the earlier legislation. There is no question that these issues are of vital importance to this case. If *Bull Steamship* is controlling, then we are automatically vindicated. On the other hand, if *Yellow Transit* is affirmed, then the present dispute still demands resolution. *The Court should bear in mind that there has been no decision by any court, nor any reputable authority that would extend a judge's power to issue a permanent injunction over undetermined possible work stoppages in the future.*

B. The Courts Below Were Correct In Holding That Refusals to Perform Work During the Term of a Bargaining Agreement Remain Within the Purview of Prior Anti-Injunction Legislation.

Both the district court and the Seventh Circuit relied upon the broad holding of *Bull Steamship* in upholding the motion to dismiss Count III of the Complaint. In thus ruling, the courts below did not have to meet the question whether an injunction operating only over future conduct is distinguishable from the type of injunction in *Yellow Transit*, which was directed at only a pending work stoppage. We do not propose to extensively re-argue the *Yellow Transit* issue since it has already been exhaustively reviewed by this Court. The Court should note, however, that the Employer's brief in the present litigation rests solely on the issue presented in *Yellow Transit* and completely disregards the fact that no work stoppage was ever pending during the course of this suit. The Employer completely merges injunctions over current activity with injunctions operating over possible future conduct. The Employer reasons that Norris-LaGuardia was never designed to cover any disputes during the term of collective bargaining agreements and, therefore, as Section 301 should sanction an injunction in the *Yellow Transit* type of situation, an injunction should necessarily be allowed here. In light of the decisions below, and the Employer's argument, we first desire to add our support to the holding of the Seventh Circuit and the principles established in *Bull Steamship* before reaching the issues peculiar to this controversy.

The Employer has built its argument on the theory that there was no federal litigation concerning work stoppages during the term of bargaining agreements prior to the passage of the Norris-LaGuardia Act. The Employer rea-

sons, therefore, that Congress could not have had in mind such situations in forbidding injunctions in "labor disputes" by federal judges. Although the Employer can find no relevant legislative history surrounding the passage of Norris-LaGuardia, heavy reliance is placed upon the supposed absence of litigation prior to the passage of the Act. Presumably, this argument is based on the accepted historical fact that Norris-LaGuardia was the culmination of a ground swell of feeling to end, once and for all, the intervention of the courts in labor disputes through the unpredicated and sometimes summary use of the injunction.

Two significant Court of Appeals' opinions from the First and Eighth Circuit decided during the interim between Clayton and Norris-LaGuardia strikingly weaken the Employer's position. The First Circuit had the opportunity of construing the Clayton Act's relevancy to an employer's action for an injunction against a threatened strike which was alleged to be in violation of the arbitration provisions of a current collective bargaining agreement. In *Foss* v. *Portland Terminal Co.*, 287 F. 33 (C. A. 1, 1923) the plaintiff-employer maintained that Clayton's prohibition against injunctions in "employer-employees" controversies did not extend to work stoppages in contravention of a bargaining agreement. The court refused the injunction, relying upon what it felt to be a clear direction from Congress:

> "If it be assumed that the action taken by the defendants in their vote of July 14, if carried out, would be a breach of their contract to confer and to arbitrate their differences, it does not follow that the complainant is entitled to injunctive relief. There can be no doubt that this is a case between an employer and its employees involving a dispute concerning terms or conditions of employment. * * *" (287 F. 33, 36.)

B. The Courts Below Were Correct In Holding That Refusals to Perform Work During the Term of a Bargaining Agreement Remain Within the Purview of Prior Anti-Injunction Legislation.

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In *Kinlock Telephone Co.* v. *Local Union No. 2*, 275 F. 241 (C. A. 8, 1921), cert. den'd 257 U. S. 662 (1921), the Eighth Circuit issued a contrary ruling. The court sanctioned an injunction against an attempted strike by a union to obtain a union shop during the life of a bargaining agreement providing for arbitration of disputes. In reasoning similar to the Employer's position regarding individual liability in Count II of the subject complaint, the Eighth Circuit in 1921 stated:

> "[W]hile anyone may quit their employment even though a contract exists, yet, they may not peacefully persuade others to break their contracts in order to gain their ends. * * * The appellees, who were not employees of appellants, persuaded some of the employees under contract to break the same, were attempting to persuade others to do likewise. * * *" (275 F. 241, 248.)

The *Foss* and *Kinlock* cases both support the conclusion that it is unreasonable to exclude the present controversy from the general category of "labor disputes" covered by Norris-LaGuardia. It was this kind of confusion in the application of Clayton that Congress meant to eradicate. This was one of the major theses of the classic work on labor injunctions by Frankfurter and Greene. In fact, both the *Foss and Kinlock* decisions were noted by the authors in a list of significant federal court decisions following the enactment of Clayton demonstrating the variegated policies of the judges. See Frankfurter and Greene, *The Labor Injunction* (1930), Appendix I, No. 41 and 53.

Norris-LaGuardia did not attempt to resolve most of the pre-existing conflict among the courts by establishing what union activity was "lawful" and "unlawful". Congress simply withdrew the injunctive remedy from the federal courts regardless of how peaceful labor activity was characterized. Alleged contract breaches, as well as

common law torts, may arguably have remained "unlawful", but beyond the reach of an injunction. The historic role of Norris-LaGuardia was succinctly summarized by Professor Charles O. Gregory in *Labor and the Law* (1961 Ed.) at page 190:

> "Congress did not give organized labor a complete carte blanche as fas as its economic activities were concerned. These activities, in such an economic context, it declared, should not be subject to the injunctive powers of federal courts. From this it may be implied that they were still subject to other legal procedures such as criminal proceedings and actions for damages, when appropriate."

The history of federal labor legislation since Norris-LaGuardia has been characterized by the specific "legalization" or "protection" of various forms of labor activity; or control of such activity; or the declaration that such astivity is illegal or an "unfair labor practice" and thereby subject to mandatory control directly by the federal courts or through the National Labor Relations Board. We submit that there is no reasonable justification for concluding that Congress has taken any such action over work stoppages during the term of no-strike clauses of bargaining agreements.

The Tenth Circuit in *Yellow Transit* cited the Supreme Court's decision in *Lincoln Mills* for authority that Section 301 of the Labor Managment Relations Act withdrew any protection of Norris-LaGuardia for breaches of bargaining agreements. The Tenth Circuit reasoned that since *Lincoln Mills* sanctioned specific performance of arbitration commitments, the prohibitions against injunctions directed toward work stoppages during the life of such commitments must be considered lifted. We submit that *Yellow Transit's* interpretation and application of *Linclon Mills* is incompatible with better reasoned authority.

We submit that the courts below placed correct reliance on the dictates of the Supreme Court in *Railroad Telegraphers* v. *Chicago & Northwestern R. Co.*, 362 U. S. 330, 4 L. Ed. 2d 774, 80 S. Ct. 761 (1960.) (Memorandum of Decision, District Court, R. 45; Opinion Court of Appeals, R. 77.) The basic teaching of *Railroad Telegraphers* is that it is not within a court's prerogative to impose limitations on an established policy of Congress. In that case the Supreme Court held that a district court could not issue an injunction against a strike under the Railway Labor Act, 48 Stat. 1185, 45 USC Sec. 151. The Court held that Norris-LaGuardia removed the possibility of use of injunctive powers in any labor dispute without a specific mandate to the contrary from Congress. The railroad argued that the strike was in violation of the collective bargaining procedures and therefore beyond the protection of Norris-LaGuardia. The Supreme Court first found that the plaintiff had not stated a valid cause of action because the strike was not in violation of the union's obligation to bargain. Nevertheless, it is extremely significant that the Court believed it necessary to hold that regardless of the merits of the railroad's contentions, the remedy of injunction was not within the federal court's powers to grant. The decision of the Supreme Court underscored the fact that Congress alone has authority to limit the scope of Norris-LaGuardia:

> "Section 4 of the Norris-LaGuardia Act specifically withdraws jurisdiction from a district court to prohibit any person or persons from 'ceasing or refusing to perform any work or to remain in any relation of employment.'
>
> "In any case involving or growing out of any labor dispute 'as herein defined' * * * unless the literal language of this definition is to be ignored it squarely covers this controversy. *Congress* made the definition broad because it wanted to be broad. There are few

> pieces of legislation where the Congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted." (362 U. S. 330 at 335.)

The Employer relies upon an earlier decision of the Supreme Court in *Brotherhood* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635 (1957). In that case, the Court upheld an injunction against violation of the adjustment procedures spelled out in the Railway Labor Act for settling "minor disputes." Decided in the same session as *Lincoln Mills*, the Supreme Court in *Chicago River* was very definite, however, that its decision was not to be construed as endorsing any limitation upon Norris-LaGuardia. The Court followed the detailed and unambiguous provisions of the Railway Labor Act in finding that Congress had intended in a specific type of railway dispute that certain procedures of the Act were to be exclusive. The Court stated:

> "The Brotherhood has cited several cases in which it has been held that the Norris-LaGuardia Act ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other statute. We believe that these are inapposite to this case. None involved the need to accommodate two statutes, when both were adopted as a part of a pattern of labor legislation." (353 U. S. 30, 42.)

Chicago River, in light of subsequent decisions, has been understood by authorities as a holding limited to the precise language of the Railroad Labor Act. This understanding of the Supreme Court's ruling has been reinforced by a recent decision of the Ninth Circuit in *Butte Anaconda Ry.* v. *Brotherhood of Firemen*, 268 F. 2d 54 (C. A. 9, 1959). The Ninth Circuit cited *Chicago River* in holding that the Railway Labor Act does not override the prohibition of the Norris-LaGuardia Act against the issuance of injunc-

tions in railway disputes. The court drew a sharp distinction between "minor" disputes under the Act, with its detailed procedures for settlement, and the general provisions of the Act relating to "major" disputes. *Chicago River* demonstrates that unless there is clear evidence supporting repeal, the basic policy of the federal anti-injunction acts controls.

A recent article in the Yale Law Journal pointedly summarized the distinction between the Court's construction of the Railway Labor Act and, what the author believes, a misapplication of Section 301 in *Yellow Transit*:

> "* * * *Chicago River* and *Yellow Transit* are not two of a kind. The legal history of the 1934 amendments of the RLA indicates that its draftsmen gave no thought to the provisions of Norris-LaGuardia enacted two years before. In contrast, both the legislative history and final text of the LMRA are replete with references to the power of the courts to issue injunctions notwithstanding the prohibitions of Norris-LaGuardia." Comment, *Statutory and Contractual Restrictions On The Right To Strike During The Term Of A Collective Bargaining Agreement*, 70 Yale L. J. 1366, 1398 (1961).

The legislative history surrounding the Labor Management Relations Act is completely consistent with our position that Norris-LaGuardia does cover the present controversy and the prohibitions contained in that act have not been repealed by Section 301. The relationship of the two acts, from the point of legislative history, has been underscored by several legal commentaries since the issue has been raised in the cases before this Court. The Nebraska Law Review made this observation in commenting on *Yellow Transit*:

> "In this situation, the only federal law that was being carried out and fashioned from our national labor laws was the Taft-Hartley Act itself. But when the problem of a no-strike clause is considered then certainly the

> Norris-LaGuardia Act cannot be dismissed so easily. While Congress may not have legislated in Norris-LaGuardia as to arbitration, it does seem that it specifically legislated with respect to strikes in that Act." Comment, *Federal Court Injunction Against Breach of No-Strike Clause*, 40 Neb. L. Rev. 534, 538 (1961).

The Nebraska Law Review comment is particularly significant in that the author is sympathetic to *Yellow Transit* from his conception of social policy, yet still believes that action must necessarily come from Congress and not the courts.

The same point is made in the Yale Law Journal comment, cited above:

> "But in limiting the application of Norris-LaGuardia, *Yellow Transit* cannot be grouped with *Lincoln Mills* and *Steelworkers* where orders to arbitrate were issued, for Norris-LaGuardia clearly encourages recourse to the arbitration process. Furthermore, there is evidence that the framers of Taft-Hartley, though rendering Norris-LaGuardia inapplicable in several instances to avoid conflict with the directives of the LMRA, purposely deleted from the committee draft of Section 301 a provision withdrawing Norris-LaGuardia from the area of contract enforcement. Thus, the argument raised by *Yellow Transit* cannot be reconciled with the legislative history and express language of Norris-LaGuardia." 70 Yale L. J. 1366, 1397-8 (1961).

The official legislative history of Section 301 coincides with the analysis of the law reviews. The bill as proposed by the House of Representatives specifically exempted the coverage of Norris-LaGuardia from suits for violations of collective bargaining agreements. The Senate rejected the House's proposal and the joint conference agreement eliminated that part of the House Bill. See *U. S. Code and Congressional Service*, First Sess. 80th Cong. pp. 1172-1173

(1947). The House proposal was the result of open and heated debate. Congressmen were fully aware of the implications of prior anti-injunction legislation to Section 301 and the serious effects of their decision to exclude Norris-LaGuardia. Remarks of Congressman Marcantonio at the culmination of one of the debates, reflects the heat of argument:

> "*Section 302(e)* provides that the Norris-LaGuardia Act shall have no application in actions and proceedings involving violations of agreements between an employer and a labor organization or other representative of employees. The proponents of this legislation are not satisfied to open up the Federal courts to innumerable suits for breach of contract, they must also provide that an alert employer can secure an injunction before the breach occurs." (*Vol. 93 Cong. Rec., 80th Cong. 1st Sess., Part III (1947).*)

In the federal decisions since the enactment of Section 301, *Yellow Transit* stands practically alone for the proposition that Congress intended to remove Norris-LaGuardia from labor disputes under bargaining agreements. *Yellow Transit's* reliance upon *Lincoln Mills* is at odds with clear Congressional history and the reasoning of most federal judges.

The Second Circuit in *Bull Steamship* specifically dealt with the Supreme Court's holding in *Lincoln Mills* that Norris-LaGuardia did not prevent specific performance of an arbitration clause of a bargaining agreement. In reference to *Lincoln Mills* the Court stated:

> "But this case does not say that Sec. 301 authorizes federal courts to issue injunctions when that remedy is clearly prohibited by the Norris-LaGuardia Act. The Court does hold, after an analysis of legislative history, to reach the conclusion just quoted, that the issuance of an order compelling arbitration was not prohibited by the Norris-LaGuardia Act * * *. Indeed

> the Court found that *Sec. 8, 29 U. S. C. Sec. 108,* indicates a congressional policy favoring the settlement of labor disputes by arbitration." (250 F. 2d 326, 329.)

Bull Steamship is completely consistent with the Second Circuit's earlier holding in *Signal-Stat* v. *U. E.*, 235 F. 2d 298 (C. A. 2, 1956). That case is the leading authority for the defendants' position in their Respondents' Brief in this action that an alleged breach of a no-strike clause is an arbitrable issue under a bargaining agreement. (See Brief, p. 32, *supra.*) The Second Circuit has recognized the dangerous intrusion by the judiciary into legislative policy if it is to use injunction powers to interfere with a method of settling labor disputes. We recommend for the Court's analysis an exhaustive study of Section 301 and the federal anti-injunction acts in Vol. 70 Yale L. J. 70 (1960) entitled, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia.*

Bull Steamship recognized that the Supreme Court in *Lincoln Mills* made certain that its decision be limited to specific performance of arbitration commitments. The Court did not hold that Section 301 had placed limitations on Norris-LaGuardia:

> "The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed. Section 8 of the Norris-LaGuardia Act does, indeed, indicate a Congressional policy toward settlement of labor disputes by arbitration, for it denies injunctive relief to any person who failed to make 'every reasonable effort' to settle the dispute by negotiation, mediation, or 'voluntary arbitration'." (353 U. S. 448, 458 (1957).)

See also *Local 19* v. *Buckeye Oil Co.*, 236 F. 2d 776 (C. A. 6, 1956), cert. den'd. 354 U. S. 910 (1957).

An important decision of the District Court for the Eastern District of Louisiana, coming after *Chicago River,*

focuses on the significance of the Supreme Court decisions since *Lincoln Mills* and *Bull Steamship. Baltimore Contractors* v. *Carpenters,* 188 F. Supp. 382 (E. D. La. 1960), joins the line of substantial authority holding that the judiciary cannot interpret Section 301 so as to override the anti-injunction laws. As the lower court in the subject suit, the district court in *Baltimore Contractors* relied upon *Railroad Telegraphers* for the basic rule against "judicial legislation." The district court refused to follow the reasoning of the Tenth Circuit in *Yellow Transit* that *Lincoln Mills* and *Chicago River* had lifted the Norris-LaGuardia ban over work stoppages during the term of a no-strike clause. The Louisiana federal court concluded:

> "But none of this amounts to a pronouncement that the express prohibition of the Norris-LaGuardia Act will be cast aside to permit enjoining a strike when such action violates a provision of the collective bargaining agreement. The Railway Act exception was made in light of an explicit provision in the later enactment making arbitration of 'minor disputes' compulsory and declaring the Adjustment Board's decision 'binding upon both parties,' and it has been narrowly confined within the limits of that requirement.
>
> "As for *Lincoln Mills,* an obvious distinction exists between the holding there that Section 7 of the Norris-LaGuardia Act may be circumvented and the suggestion here that Section 4 of the same Act should be ignored. It is one thing to get around procedural rules when they appear 'inapposite' and quite another to ride roughshod over a categorical prohibition." (188 F. Supp. 382, 383.)

The grave responsibility which the federal courts would assume by condoning injunctions as a means of ending collective bargaining disputes was seen by a district court in *Alcoa S. S. Co.* v. *McMahon,* 81 F. Supp. 541 (S. D. N. Y., 1948). The court refused an employer's request for an injunction against recalcitrant employees from refusing to

perform certain work assignments. Although the court admonished the union for being unable to exercise effective control over its membership, the court reasoned:

> "*Whatever state policy may be, it is not yet the policy of the United States judicially to compel obedience to collective bargaining agreements on pain of imprisonment.*" (81 F. Supp. 541, 544) (Emphasis added.)

The Second Circuit sustained the lower court in *Alcoa S. S. Co.* v. *McMahon,* 173 F. 2d 567 (C. A. 2, 1949), cert. den'd, 338 U. S. 821 (1949).

Numerous decisions since *Foss,* through *Bull Steamship,* up to *Baltimore Contractors* can be cited in accord. In *W. L. Mead* v. *Teamsters,* 217 F. 2d 6 (C. A. 1, 1954), a company sought an injunction against a peaceful strike then in progress by a union allegedly in violation of a no-strike clause. The First Circuit applied the unambiguous language of Section 4 of Norris-LaGuardia in determining that an injunction could not issue. Furthermore, the court could see no reason why Labor Management Relations Act should be so interpreted as to effectuate a partial repeal of the anti-injunction statutes:

> "It is an accepted canon of construction that repeals by implication are not favored. The persuasive force of this aid to construction may be somewhat weakened where the question is whether the later enactment has by implication repealed some obscure and generally forgotten statute. But here the earlier enactment is a significant and tremendously important piece of legislation which the Congress evidently had specifically in mind when it came to enact the Labor Management Relations Act in 1947." (217 F. 2d 6, 9.)

With foresight, the court went on to recognize the possibility of equitable relief under Section 301 of the kind envisioned by *Lincoln Mills* "• • • in terms which do

not trench upon the interdictions of Sec. 4 of the Norris-LaGuardia Act." 217 F. 2d 6, 9. In this regard the Court should note the subsequent decision of the First Circuit in *Am. Fed. of Technical Engineers* v. *G. E.*, 250 F. 2d 922 (1957), cert. den'd 356 U. S. 938 (1958), holding that the courts may order parties to arbitrate without conflicting with Norris-LaGuardia or Clayton. Cf. *In re Third Ave. Transit Corp.*, 192 F. 2d 971 (C. A. 2, 1951). The same holding was rendered in *National Dairy Products* v. *Hefferman*, 195 F. Supp. 153 (E. D., N. Y., 1961); *Dredging Co.* v. *Operating Engineers*, 48 LRRM 2713 (E. D., N. Y., 1961); *I. B. E. W.* v. *Stone & Webster*, 42 LRRM 2584 (W. D. La. 1958); *Sound Lumber Co.* v. *Lumber & Sawmill Workers*, 122 F. Supp. 925 (D. C. Cal., 1954); *Castle & Cooke Terminals* v. *International Longshoremen*, 110 F. Supp. 247 (D. C., Hawaii, 1953); *International Longshoremen* v. *Libby, McNeil & Libby*, 115 F. Supp. 123 (D. C., Hawaii, 1953); and in *United Packinghouse Workers* v. *Wilson & Co.*, 80 F. Supp. 563 (N. D., Ill., 1948), in which the court acting under Norris-LaGuardia refused to issue an injunction on behalf of the union against the employer for continued breaches of the collective bargaining agreement. Cf. *Farrand Optical Co.* v. *I. U. E.*, 143 F. Supp. 527 (S. D., N. Y. (1956)), cited by the employer at page 15 of its Brief, which was decided prior to *Bull Steamship* and, therefore, can no longer be considered controlling. The Court should note that even though *Farrand Optical* did not apply Norris-LaGuardia, the district court distinguished a strike during the course of a bargaining contract over a strictly union jurisdiction question from those in which "a labor dispute" involving a substantive issue under the contract.

C. If an Injunction Is Sanctioned In This Action Inevitable Conflict Will Result Between the Court's Contempt Powers and the Procedures Established by Congress and Developed by the NLRB for Resolving Labor Disputes.

Whatever the resolution of *Yellow Transit*, we submit that no court has injunctive powers to reach into the indefinite future to establish itself as the primary control over the daily course of labor relations between unions and employers.

We remind the Court that the injunction sought by the plaintiff would attempt to place the going bargaining relation between the International and Local and Sinclair Refining into the hands of the courts. An injunction that would make every *alleged* interference with a grievance procedure subject to the contempt powers of a court would cast a heavy cloud over the development of mature relations between the parties. The effect of such an injunction could likely weaken or even destroy the grievance and arbitration procedure by giving the employer the opportunity for court control over its relationship with the union and the members of the bargaining unit.

It must be borne in mind that plaintiff's request for an injunction is not against any present activity by the defendants. Plaintiff is seeking an injunction against all of the defendants *and any person* who is subject to any collective bargaining agreement between the defendant unions and the company *in the future* who might in any manner interfere with "production, normal operations or normal employment at said refinery" over an issue which "could be the subject of a grievance under the grievance procedure." (Complaint, Ct. III, R. 18.)

Although the plaintiff's claim for an injunction is couched in terms of the collective bargaining agreement, in effect,

the plaintiff seeks to resurrect the common-law action of conspiracy to violate an employment contract which predates the Clayton Act.

Significantly for the present suit, Indiana was one of the first states to reject the conspiracy theory as a method for imposing individual liability on workers participating in a peaceful work stoppage. *Karges Furniture Co.* v. *Amalgamated Woodworkers,* 165 Ind. 42, 75 N. E. 877 (1905). See article by Bernard Mamet, *The Counterpart of Federal Law in the Labor Equation: Indiana as Illustrative of State Labor Law,* 32 Notre Dame Lawyer 563 (1957).

Under Section 301 of Taft-Hartley an employer, at most, is given power to sue a union for breach of the bargaining agreement. Count III of the Complaint attempts to avoid the limitations of Section 301 by imposing the contract as a matter of personal obligation upon every individual in the bargaining unit. This was the situation which developed after passage of the Clayton Act which brought Congress to pass the Norris-LaGuardia Act.

We must reiterate that Norris-LaGuardia was not passed to legalize all activity by unions and employees. The Act was adopted to prevent pre-emptory determinations of unlawfulness by the courts resulting in immediate injunctions as an arbitrary means of ending a labor dispute. The underlying policy of Norris-LaGuardia bears special significance to the issues at hand. By placing the future conduct of the Unions and Sinclair's employees under contempt powers, the door will be again open to the broad range of judicial control which existed at the turn of the century.

We again may be faced with employer affidavits, *ex parte* hearings, and preliminary injunctions and contempt citations. Instead of charges of breaches of em-

ployment contracts for attempted unionization, charges of "conspiracies to circumvent the grievance machinery" or "interference with production" will be levied against individuals and groups of employees on the strength of an aging permanent injunction. No one could foresee the maturation of an arbitration process sincerely followed by both management and labor in an atmosphere permeated with contempt citations. Furthermore, the reaffirmation of no-strike, no-lockout pledges at every anniversary date of a bargaining contract could hardly be expected.

In *The Labor Injunction* the use of the injunction before and during the era of the Clayton Act to bind entire groups of individual workingmen to contempt proceedings is set out in great detail. The authors recite the admonition of Justice Brandeis, writing in dissent, on the abuse of the injunction on pages 132-33 of their work:

> "* * * [T]he injunction is not ordinarily sought 'to prevent property from being injured nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men'." (Brandeis, *J.*, in *Truax* v. *Corrigan*, 257 U. S. 312, 368 (Dissent).)

The admonitions of Justice Brandeis demand application to the kind of injunction the Employer seeks this Court to condone. The elaboration of Justice Brandeis' concern with the potential abuse of the injunctive power in *The Labor Injunction* is vital to the present controversy. (Note *The Labor Injunction*, pp. 132-3.) The primary pitfalls of abuse set forth by the authors are cogent:

> 1. An employer could obtain *ex parte* restraining orders over any and all labor activity by simply submitting to the court a verified statement that the employer risks immediate damage to his property or business relations. Title 28, U. S. C. Fed. Rules of Civil

Procedure, No. 65(b). Whether or not the alleged activity was unlawful; whether the employer had committed unlawful acts which precipitated the activity; and whether the employer's business was in serious danger could only be heard after the activity was ordered stopped under the onus of contempt citations. The authors underscored the practical effects of *ex parte* orders and open hearings at a later date:

> "The demarcation between permitted and forbidden activity is a process phrased in legal vernacular and executed through legal concepts. * * * Aside from the ambiguous meaning of loose concepts, no matter what content one adopts, there is the initial question, did the requisite event occur? The stuff for decision of this pure issue of fact is found in complaint and supporting affidavits; later, upon preliminary hearings, there are counter-affdavits." *The Labor Injunction*, p. 61.

See also, above work at pp. 201-2 on the permanent damage which can be administered by a well meaning judge, ill informed on labor relations, who issues a temporary restraining order with "* * * less opportunity for consideration than would be available if the question were one concerning the negotiability of a new form of commercial paper." *The Labor Injunction*, p. 202.

2. The vague coverage of injunctive orders operating into the future, as applied to entire union organizations and groups of employees puts large numbers of individuals within the civil and criminal contempt powers of the courts. See Rule 65(d) Fed. Rules of Civil Procedure. The effect of such injunctions is to resurrect old tort conspiracy doctrines which were used against union leaders and members in their individual capacities under loose charges of inducing breaches of contractual relationships. See, Chapter 3, *The Labor Injunction* and, in particular, footnote 96

on page 104, citing *Foss* v. *Portland Terminal Co.*, cited *supra* as an illustration of the use of the injunction against union officials which had been dissolved by a higher court.

The dissenting opinions of Justice Brandeis eventually found vindication in the public policy expressed by Congress through passage of Norris-LaGuardia. Congress has never revoked this policy and we submit that the employer is in gross error in seeking the federal courts to circumscribe this policy through decision.

D. A Permanent Injunction Over Undetermined Events Would Conflict With the Jurisdiction of the NLRB and the Basic Rights of Employees To Be Free From Employer Domination and Discrimination.

In addition to creating conflict between court action and grievance and arbitration procedures the requested injunction is completely incompatible with the jurisdiction of the NLRB and with the specific rights of employees under the National Labor Relations Act.

In the foregoing sections of this brief, we demonstrated that the NLRB has an established history of determining whether an unfair labor practice has been committed by an employer or union in connection with a work stoppage during the term of a no-strike clause. Under the Labor Management Relations Act the NLRB has been given express power to obtain cease and desist orders from federal courts for activity by management or labor, which are unfair labor practices. The right of the NLRB to obtain injunctions in certain classes of labor disputes has been specifically granted by Congress.

Should an injunction be allowed, the court's action would not only conflict with the exclusive jurisdiction of the NLRB, but extend its powers under Section 301 beyond that which was ever intended by Congress. In formulating

an administrative procedure for the adjudication of labor disputes Congress explicitly provided for injunctive relief in those situations in which it believed it was required.

Since the Wagner Act, through the 1947 and 1959 amendments contained in the Labor Management Relations Act, the grants of injunctive power to federal courts upon NLRB petitions has been the result of a conscious limitation by Congress on its earlier anti-injunction legislation. In the main, Congress has not chosen to simply return the injunction directly back to the hands of judges. The initiation of temporary and permanent mandatory relief must come from the Board processes. The careful delineation of the allowable areas of labor-management disputes which can be reached by restraining orders has paralleled the development of an expert administrative agency for the settlement of these disputes.

If the injunction is going to be interjected into disputes during the term of bargaining agreements, it must be left to Congress to decide on the extent and form the new procedures will take. Congress is conscious of its power in this area and as a matter of social policy has not chosen to act. The official legislative history of the Labor Management Relations Act of 1947 is testament to this fact. The Bill as first proposed by the Senate made it an unfair labor practice under Section 8(b) of the Act "To violate the terms of a collective bargaining agreement to submit a labor dispute to arbitration." Being an unfair practice, alleged work stoppages in contravention of grievance and arbitration procedures would be subject to restraining orders under the rules and hearing procedures of the NLRB under Sections 10 and 11 of the Act. *See U. S. Code & Congress. Service, 1st Sess., 80th Cong., p. 1150 (1947).*

The danger of "judicial legislation" through the issuance of injunctions under Section 301 was seen by the

Eighth Circuit in *Amalgamated Ass'n* v. *Dixie Motor Coach Co.*, 170 F. 2d 902 (C. A. 8, 1948). The court held that an employer could not seek an injunction against a union for instituting a secondary boycott picket line in violation of the Labor Management Relations Act. Section 303 of the Act, as Section 301, allows an employer to sue a union in federal court for engaging in an unlawful boycott. The employer sought an injunction under the power granted to sue the union. The court invoked Norris-LaGuardia and refused to hear the employer's request. The court emphasized the requirement not to disrupt an integrated policy over labor disputes which has been developed by Congress.

The same principle of legislative interpretation as applied to the Labor Management Relations Act was followed by the District Court for the Southern District of Indiana in *Sanders* v. *Birthright*, 172 F. Supp. 895 (1959). The court applied Norris-LaGuardia to a suit between an employer and union officials over the regulation of welfare funds. Section 302 of the Labor Management Relations Act contains exact procedures for the administration of these funds by employers and unions and grants the district courts power to enjoin violation of these procedures. The court held that the provision for injunctive relief could not be expanded to allow such relief where there had been no claim that the specific procedures of Section 302 had been violated. The district court's interpretation of Section 302 could well be translated to suits under Section 301:

> "If subsection (e) in itself conferred jurisdiction upon the Court it would be a delegation of broad equitable powers upon the Courts to regulate Union Welfare Funds which would result in the birth and establishment of a federal law for the administration of welfare trusts. This Congress did not intend. Subsection (e) was necessary to remove the bars of the Norris-LaGuardia and Clayton Acts * * * in enforcing

violations of subsections (a) and (b) and was not included to establish broad jurisdiction for the District Courts * * *." (172 F. Supp. 895, 901.)

The requested injunction not only conflicts with the power of Congress to legislate, but contravenes the present primary authority of the NLRB. The Employer's position is predicated on the same misconception which underlies its attempt to avoid the application of the Supreme Court's ruling in *Garmon* as it relates to the action for damages against the Local Officials contained in Count II of the Complaint. The Employer incorrectly assumes that every refusal to work by an employee or so-called interference with the Employer's directives during the tenure of no-strike and arbitration clauses is unequivocally unprotected and, therefore, beyond the NLRB's power to investigate and hear. The continuous line of decisions by the Board cited in Section III of this Brief demonstrates the unsoundness of that position. (See authorities cited on p. 68 of Brief.) If the Employer were allowed its injunction the local federal district court would be cast on uncharted seas, inviting continuous collision with the Board where arbitration would have doubtful stability.

E. Regardless of Any Other Consideration, the Injunction Sought by the Plaintiff Is Beyond a Court's Equity Power to Grant.

The defendants have stressed the consequences which would be thrust upon a court and parties should an injunction be allowed. But even if Congress had not relieved the courts of power to enjoin labor disputes, the injunction requested in the present case should not be granted because it is impossible to administer.

The first point which must be considered is that the collective bargaining agreement upon which this action is

based is not for an indefinite duration. It is subject to renegotiation or termination at a prescribed date. That date was June 14, 1959. Nevertheless, plaintiff's demand for an injunction extends indefinitely and encompasses conduct under the last contract, "* * * or an extension thereof, or any other contract, bewteen the parties which shall contain like or similar provisions." (Complaint, Ct. III, R. 18.)

It is axiomatic that a court's equity power to enjoin breaches of contract cannot extend beyond the contract's duration. This request is without parallel in equity precedent. Leading decisions among state courts within the Seventh Circuit are among the well established authority that injunctions cannot be extended beyond the term of the agreement they are meant to enforce. The principle was clearly stated in *People ex rel. Hafer* v. *Flynn,* 144 N. E. 2d 747, 14 Ill. App. 2d 301, 314 (1957):

> "When the right ceases, by expiration of the time fixed in the contract or otherwise, the injunction also ceases to have any force or power. It became *functius officio*" (Other Illinois authorities cited).

The same principle has been applied in Illinois to labor disputes. In *Preble* v. *Architectural Union,* 260 Ill. App. 435 (1931), the state court held that it had power to enjoin work stoppages over inter-union rivalry but that the injunction could not extend beyond the term of the plaintiff-employer's contract with the defendant union:

> "Obviously the decree must be construed to mean that the injunction would not be in effect after the date of the expiration of the contract, namely, June, 1934." 260 Ill. App. 435, 442 (1931).

Accord: *Match Corp.* v. *Acme Match Corp.,* 1 N. E. 2d 867, 285 Ill. App. 197 (1936). Cf: Employer's analysis of *Preble* at page 13 of its Brief. Cf: Also *Schlesinger* v. *Quinto,*

194 N. Y. S. 401 (1922); *Goldman* v. *Cohen*, 227 N. Y. S. 311 (1928); *Meltzer* v. *Kaminer*, 227 N. Y. S. 459 (1927); *Gilchrist* v. *Metal Polishers*, 113 A. 320 (Chan., N. J., 1919); and *Burgess* v. *Georgia*, 96 S. E. 864, 148 Ga. 417 (1918) relied upon by the Employer on pages 11-13 of its Brief. In none of these cases was federal anti-injunction legislation involved nor was there any issue of the application of a state "little Norris-LaGuardia Act." None of these cases involved injunctions operative only in futuro. In fact, *Schlesinger, Gilchrist* and *Burgess* all specified that the restraint imposed should not extend beyond the term of the current bargaining agreement. The Court should also note that *Schlesinger* and *Meltzer* are listed in Appendix III, and *Goldman* on page 110 of *The Labor Injunction* as New York injunction cases dealing with labor disputes from 1920-28.

The effect of an injunction into the future has far more serious consequences than the limits placed upon the parties' contractual rights. We must impress the Court again that the injunction requested would subject every major and minor dispute and quarrel which might be subject to a grievance to contempt charges. Judicial power would be felt over every type of discord in the plant which might temporarily effect production. The injunction would reach the entire membership of the Local and any wrangle a worker might have with his immediate supervisor. It requires a complete divorcement from reality to believe that all of the healthy and commonplace give and take between management and labor can occur with the constant threat of a citation proceeding.

Every claimed interference with production by a workman would have to be tested by the district court for violation of its injunction. In every instance the court would have to determine if the workman had in some way impeded production and, if so, was his action a legitimate response

to a prior breach of the bargaining agreement by a supervisor.

The Supreme Court in *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, 85 L. Ed. 930, 61 S. Ct. 693 (1941) set down the fundamental rule that injunctions in labor disputes, when allowed, cannot restrain acts which might occur in the future, other than the concrete, specific issue which has been adjudicated by the court. In *Express Publishing* the Supreme Court said:

> "But the mere fact that a Court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." (312 U. S. 426, 435-6.)

The Supreme Court's decision is directly applicable to this case. The plaintiff's request for an injunction is of such an ambiguous and broad nature than any unpredictable and short-lived dispute by any member of the bargaining unit could come within the contempt processes of the injunction. Accord: *N. L. R. B.* v. *Stone,* 125 F. 2d 752 (C. A. 7, 1942) cert. den'd, 317 U. S. 649 (1942), in which the Seventh Circuit refused to uphold a cease-and-desist order of the NLRB covering all future violations by an employer of the right of a union to organize and engage in concerted activities. The court held that the order was too broad and would include numerous unfair labor practice charges unrelated to the charge brought in the instant case. Accord: *N. L. R. B.* v. *Burry Biscuit Corp.*, 123 F. 2d 540 (C. A. 7, 1941) in which the Seventh Circuit held that an order of the NLRB directed against the respondent and their "agent, successors and assigns" was not en-

forceable because it attempted to cover individuals unrelated to the dispute.

The ramifications of an injunction issued in the subject case were pointedly stated by the Court of Appeals for the District of Columbia in *Morrison-Knudson Co.* v. *N. L. R. B.*, 270 F. 2d 864 (1959). The court refused to enforce a NLRB order insofar as it sought to forbid future conduct by an employer. The court cautioned:

> "It is well to bear in mind that a court of appeals should not become a labor court of first instance by virtue of its contempt powers." (270 F. 2d 864, 865.)

The requested injunction is contrary to law and disturbs common reason. It would handcuff relations between the parties by such a degree that it would lead into the further error of having an order issue which is so sweeping as to enjoin acts made lawful. *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 82 L. Ed. 872, 58 S. Ct. 578 (1938.) The commodity sold by the wage earner is his manpower. No court of the United States has the power to force the sale of that commodity. Givens, *Section 301, Arbitration and the No-Strike Clause,* Vol. 11 Labor L. J. 1005, (1960.) The Labor Management Relations Act and the collective bargaining process is an attempt to resolve disputes, not by arithmetic formulas, but by determining what can reasonably be expected of men in any given situation.

CONCLUSION.

The Respondents respectfully urge that the Decision of the District Court dismissing Count III of the Complaint and the affirmation of the Court of Appeals in this action be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

Nos. 430 and 434

SINCLAIR REFINING COMPANY, A CORPORATION,
Petitioner in No. 434, and
Respondent in No. 430

vs.

SAMUEL M. ATKINSON, ET AL.,
Respondents in No. 434, and
Petitioners in No. 430.

RIEF AND ARGUMENT FOR SINCLAIR REFINING COMPANY, PETITIONER IN NO. 434 AND RESPONDENT IN NO. 430.

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Defendants' Authorities Distinguished.*

Cases.

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Sinclair Refining Company's Authorities.

Cases.

*Authorities cited affirmatively by both parties will be found under the Company's Authorities.

Constitution and Statutes.

Congressional.

Miscellaneous.

IN THE

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Respondents in No. 434, and
Petitioners in No. 430.

BRIEF FOR PETITIONER, SINCLAIR REFINING COMPANY.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit (R. 65) is reported at 290 F. 2d 312. The opinion of the District Court for the Northern District of Indiana, Hammond Division (R. 42-46), is reported at 180 F. Supp. 225.

JURISDICTION.

The judgment of the Court of Appeals was entered April 25, 1961. Companion petitions for certiorari by both parties were granted December 11, 1961. Jurisdiction rests on 28 U. S. C. Section 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

Fifth Amendment to the U. S. Constitution.

National Labor Relations Act, 61 Stat. 136, 29 U. S. C. 151, *et seq.*, Sections 1, 7, 8(a) (1) and (5), 8(d), 201(c), 203(d), and 301(a) and (b) and 303(b) are particularly involved.

Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. 101, *et seq.*

The relevant provisions are printed as an Appendix hereto.

FORM OF BRIEFS.

Because of the grant of cross petitions raising distinct points and in order to avoid a multiplicity of briefs, this Court on December 27, 1961, approved a stipulation by which the parties have exchanged, in typewritten form, their affirmative briefs before printing. We print ours herewith together with our Answer to our opponent's affirmative presentation in No. 430. Our answering material in No. 430 is separately stated following our affirmative presentation in No. 434. Each side will file a reply brief.[1]

QUESTION PRESENTED IN 434.

Whether the Norris-LaGuardia Act, 29 U. S. C. 101, *et seq.*, precludes injunctive relief against continuance of a course of conduct by which a union and its members utilize strikes to procure settlements of grievances in violation of a labor contract which forbids strikes over them and provides they must be handled through a grievance procedure culminating in compulsory arbitration.

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1. Because of the companion petitions, and to avoid confusion, we refer to the parties in their original classifications of plaintiff and defendants.

STATEMENT IN 434.

This case arose out of a series of nine so-called "employee grievance strikes" in a nineteen-month period in violation of a no-strike compulsory-arbitration labor contract at a refinery operated by petitioner in East Chicago, Indiana.

The decisions below were based on the complaint and motions by defendants to strike the complaint and to stay the action.

The complaint (R. 8) is brought against Oil, Chemical and Atomic Workers International Union, AFL-CIO, an international union and labor organization which for some time had been collective bargaining agent for sundry refineries operated by the plaintiff, including that at East Chicago, Indiana, its Local 7-210 which was also the recognized collective bargaining agent at East Chicago, and twenty-four individuals who were employees in the East Chicago refinery, and were committeemen of the Local Union and agents of the International.

The complaint, filed March 12, 1959, alleges the existence of a collectively bargained contract (R. 19) between the plaintiff and the International which had been accepted by the Local Union, effective June 15, 1957 to June 14, 1959, and thereafter subject to renewal provisions. The contract (Art. III, p. 3) provides that,

> "* * * there shall be no strikes or work stoppages:
>
> "(1) For any cause which is or may be the subject of a grievance under Article XXVI of this Agreement, or
>
> "(2) For any other cause, except upon written notice by Union to Employer provided:" (Then follow provisions providing for conferences after the service of such notice and before any strike may be carried into effect.)

Article XXVI of the contract (p. 31), entitled "Grievance and Arbitration Procedure," contains the following material and mandatory provisions:

"1. A grievance is defined to be any difference regarding wages, hours or working conditions between the parties hereto or between the Employer and an employee covered by this working agreement which might arise within any plant or within any region of operations.

"GRIEVANCE PROCEDURE.

"It is the sincere desire of both parties that employee grievances be settled as fairly and as quickly as possible. Therefore, when a grievance arises, the following procedure must be followed:

"2. For the purpose of adjusting employee grievances and disputes as defined above, it is agreed that any employee, individually or accompanied by his committeeman, if desired shall:" (Then follow detailed provisions as to how employees should present grievances with time limitations provided for the various steps in the discussion procedure going through the managerial hierarchy to the Director of Industrial Relations of the Company, or his designee, who is required to render a decision to the President of the International Union (p. 33). If such decision is not satisfactory)

"* * * then, upon request of the President or any District Director of the Oil, Chemical and Atomic Workers International Union, AFL-CIO and within sixty (60) days from the posting date of the final appeal answer, there shall be set up a local Arbitration Board, and such grievances and disputes submitted to it within ten (10) days after formation of such Board. Such local boards may be set up at each refinery to deal with cases arising therefrom: * * *

"8. The above mentioned local Arbitration Board shall be composed of one person designated by Employer and one designated by the President or District Director of the Oil, Chemical and Atomic Workers

International Union, AFL-CIO. The board shall be requested by both parties to render a decision within seven (7) days from date of submission. Should the two members of the board selected as above provided, be unable to agree within seven (7) days, or to mutually agree upon an impartial third arbitrator, an impartial third member shall be selected within seven (7) days thereafter by the employer or employee member of the Arbitration Board, or such two parties jointly, requesting the Federal Mediation and Conciliation Service to submit a panel of arbitrators from which the third member of the board will be selected in accordance with the procedure of such Federal Mediation and Conciliation Service.

"9. The decision of the Board aforesaid, as provided in Section 8 hereof, shall be final. • • •"

The complaint is in three counts. Count I is bottomed on Section 301 of the Labor-Management Relations Act and prays damages for a strike participated in by approximately 999 of the approximate 1700 employees within the bargaining unit at the East Chicago refinery on February 13 and 14, 1959, over asserted pay claims on behalf of three members of the bargaining unit aggregating $2.19. The complaint alleges these claims could, and, if valid, should have been the subject of a grievance under the contract. It prays $12,500 damages.

Count II is bottomed on diversity jurisdiction and is against the individual defendants. It alleges they induced breaches of the labor contract binding on the unions, themselves and all others in the bargaining unit, and fomented, assisted and participated in the strike of February 13-14, 1959. It prays $12,500 damages.

Count III is against all defendants, rests upon both Section 301 of the Labor-Management Relations Act and diversity, and alleges that the strike of February 13-14, 1959 was but the last in a series of nine illegal strikes between

July 1, 1957 and its date, all over asserted grievances, which could, and, if valid, should have been submitted for disposition and, if necessary, to final arbitration under the grievance procedure of the contract; that each of the strikes caused substantial damages which were incapable of precise ascertainment but were greatly in excess of $10,000; that the pattern of repeated violations showed either that the defendants do not regard the no-strike contract as binding, or, in the alternative, deliberately and consistently violate it and will so continue unless enjoined. It alleges that plaintiff has no adequate remedy at law because it would be forced to resort to a multiplicity of actions in which full and complete damages would be impossible of assessment, and that such inadequate remedies at law would not achieve the national policy of avoiding unnecessary interruption of production of goods for commerce. It prays an injunction that would restrain defendants from aiding any strike because of any matter or thing which is, or could be, the subject of a grievance under the grievance procedure of the contract, or any extension thereof, or any other contract which might contain like or similar provisions.

Upon motion to dismiss, the District Court originally held all three counts of the complaint were good. It held also that the defendants' motion to stay the action pending disposition of certain grievances filed after the February 1959 strike, and alleged to involve some of the facts asserted in the complaint, should be denied (R. 26). Upon motion to reconsider, the District Court reversed its ruling as to Counts II and III. It held, in substance, that since a labor union may now be sued under Section 301 for breach of a contract, the officers and members no longer may be sued for inducing union or individual breaches. As to the injunction count, it held that *Order of Railroad Telegraphers* v. *Chicago & North Western R.*

Co., 362 U. S. 330, indicated that the Norris-LaGuardia Act did not permit the specific enforcement of a no-strike clause in a labor contract (R. 42-46).

The Court of Appeals for the Seventh Circuit held that Counts I and II were good, but that the injunction count was bad (R. 65-79).

Plaintiff sought certiorari on dismissal of the injunction count. The defendants sought certiorari on the holding that Count II was valid and, additionally, on their theory that the entire action should be stayed pending possible arbitrations which it asserted involved the subject matter.

SUMMARY OF ARGUMENT.

Although no-strike, compulsory-arbitration contracts prior to adoption of the Norris-LaGuardia Act were relatively few in number, such contracts were regarded as socially "commendable". They uniformly were enforced by injunctions forbidding strikes or lockouts as might be appropriate. There is nothing in the literature on Norris-LaGuardia or in the Congressional debates on it indicating that it was aimed at injunctions which merely enforced the obligations of a collectively bargained contract.

Although the definition of "labor dispute" in Norris-LaGuardia is broad, it has been recognized that it does not comprehend every dispute between employers and employees but only those which the history of the Act and its substantive provisions indicate Congress felt should be free from injunctive restraint. Violation of a lawful contract freely entered into is unlawful and was not a "lawful object of association" which Congress desired to protect in passing Norris-LaGuardia.

The prime purpose of the Act was to protect what were believed to be constitutional rights of free assembly and effective association. There is no right, constitutional or otherwise, to violate a contract freely and fairly entered into. Norris-LaGuardia, properly construed, never did deprive Federal courts of the power to enter injunctions of the type here involved.

If it be thought that Norris-LaGuardia ever did bar this type of injunction, it is clear that the 1947 Amendments of the Labor-Management Relations Act, stressing the importance of adherence to contracts and the desirability of arbitration as a means of settling interim

disputes, have the effect of modifying it. The Norris-LaGuardia Act, the Railway Labor Act, and the Labor-Management Relations Act are all part of a pattern of labor legislation to foster collectively bargained contracts and to reduce industrial strife.

In *Brotherhood* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, the court held that the adjudicatory processes of the National Railroad Adjustment Board for determination of so-called "minor disputes" in the railway field was a suitable substitute for strikes over them, and that such strikes could be enjoined. Every reason of policy dictating the *Chicago River* decision applies with equal, if not greater, force in the general industrial field where the parties, by contract, have agreed that grievances during the term of a contract shall be settled by compulsory arbitration and that there shall be no strikes.

Order of Railroad Telegraphers v. *Chicago & North Western Ry. Co.*, 362 U. S. 330, held by the courts below to preclude injunctive relief, was totally different from this case. The controversy there related to a permissible effort to change conditions of employment; there was nothing unlawful in what the union sought. The *Telegraphers* decision was not a retreat from the *Chicago River* decision. It was simply a different case involving a so-called bargainable matter rather than a minor dispute as to adherence to an existing contract which could be settled by some form of arbitration.

The Court has held in *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, and similar cases, that an employer's obligation to arbitrate under a no-strike, compulsory-arbitration contract may be enforced injunctively. To hold that employees may have injunctive enforcement of the arbitration clause despite Norris-LaGuardia, but that the employer cannot have injunc-

tive enforcement of the *quid pro quo* no-strike clause, would be to give Norris-LaGuardia an unconstitutional construction. Such construction would deny employers equal protection of the law.

Equal protection of the law has been recognized as an integral part of the due process guaranty of the Fifth Amendment by *Bolling* v. *Sharpe,* 347 U. S. 497, which held racial discrimination in public schools in the District of Columbia to be as vulnerable to the due process guaranty of the Fifth Amendment as it was held to be vulnerable to the equal protection guaranty of the Fourteenth Amendment in *Brown* v. *Board of Education,* 347 U. S. 483.

Injunctive enforcement of a negative covenant not to strike is the only adequate remedy which can be given. The remedy by way of damages, either for a long strike or a succession of short, so-called "wildcat" strikes, is wholly inadequate. The remedy which does the least harm to the future relations of the parties, and at the same time is most effective, is the injunction which stops illegal action before it has progressed too far.

(Our Summary of Argument in No. 430 will be found on p. 40, *infra.*)

ARGUMENT.

I.

NO-STRIKE, COMPULSORY-ARBITRATION CONTRACTS, PRIOR TO THE NORRIS-LA GUARDIA ACT, WERE UNIFORMLY ENFORCED BY INJUNCTIONS FORBIDDING STRIKES WHICH VIOLATED THEM.

Prior to 1932 it was unquestioned that labor contracts involving covenants either by the employees not to strike or by the employer not to lock out, but to arbitrate, were specifically enforceable by injunction.

Although the number of no-strike, compulsory-arbitration contracts, pre-Norris-LaGuardia, were relatively small so that there were but few cases, and although the contracts were not so elaborate as those now current, the fact is that such courts as considered them regarded them as socially desirable and enforced them by injunctions tailored to meet the particular violation which was presented. Such decisions were not criticized in *Frankfurter and Greene,* "The Labor Injunction" (1930), the most reasoned statement of the case for the bill which ultimately became the Norris-LaGuardia Act, nor in the subsequent Congressional debates.

In 1922 the Appellate Division in New York held that where a union and an employers' association had entered into a three year contract and the employers' association during its term directed its members to break the contract by lowering wages, a court of equity would compel the employers' association, by injunction, to rescind its action. The Court said *inter alia*:

> "* * * This contract has mutual obligations binding on the parties thereto. Each party knows the obliga-

> tion that it has assumed and the consequences of failure or refusal to perform those requirements. Through its control of its members it can compel performance. Under such circumstances, a decree of a court of equity can be enforced against either party and in favor of the other. * * *" (*Schlesinger* v. *Quinto*, 201 App. Div. 487, 194 N. Y. S. 401, 410).

In 1928 the Appellate Division again enforced a labor contract in *Goldman* v. *Cohen*, 222 App. Div. 631, 227 N. Y. S. 311. The contract provided: "[T]here shall be no strike or lockout pending the determination of complaints of grievances hereunder throughout the entire period of this contract." The employer threatened a lockout. The court upheld an injunction against it. After referring to cases authorizing injunctions where a union struck in violation of its contract, the court went on to say at page 313:

> "* * * where an employer is threatening to order a lockout of his employees in violation of his contract with the labor union in behalf of the employees, the right of a court of equity to prevent such contractual violation is necessarily measured by the same principle. *Schlesinger* v. *Quinto*, 201 App. Div. 487, 194 N. Y. S. 401. In both cases an injunction should issue, where there is no adequate remedy at law and the damages are irreparable."

In *Meltzer* v. *Kaminer*, the Supreme Court of New York in 1927 applied the other face of the coin (131 Misc. 813, 227 N. Y. S. 459). The court held there was a contract, the expiration date of which was fixed by parol at June 15, 1927. It provided that "work would continue uninterruptedly as long as the agreements were lived up to by the employers." In March 1927 union officials sent out notices that there would be a strike unless a wage increase was put into effect April 4, 1927. The court entered an injunction enjoining the officials from calling a strike pending trial of the action but not beyond the termination date of the con-

tract. The report of the decision does not make it plain whether the contract contained an arbitration clause.[2]

In 1930 the Appellate Court of Illinois in *Preble* v. *Architectural Iron Workers' Union*, 260 Ill. App. 435, had before it a no-strike, no-lockout, arbitration contract. The court found the contract "commendable" and held, at page 440:

> "* * * Its commendable purpose was to fix the terms and conditions of employment so that there would be no lockout or strikes without submitting the dispute, if any, to arbitration. And the defendant union, through its officials, having without any fault on the part of the complainant, called strikes and threatened to call other strikes, solely on account of a dispute with another union and without any endeavor at arbitration in violation of the terms of the contract will be enjoined by a court of equity. * * *"

There were other cases in which there were contracts that fixed wages for a definite period of time, some of which contained the equivalent of a no-strike clause and others of which did not. Strikes in violation of such contracts were held enjoinable. An example of the former class of cases is *Gilchrist* v. *Metal Polishers Union* (N. J. Chan., 1919), 113 A. 320, 321, in which the contract provided,

> "* * * there should be no further labor troubles, in which the unions would be a party, for a period of one year from the date of the letter * * *."

A strike within the one year period was enjoined. Typical of the second class is *Burgess, et al.* v. *Georgia, etc. Ry. Co.*, 148 Ga. 415, 96 S. E. 864 (1918).

We believe there were no cases prior to Norris-LaGuardia holding that contracts of the nature we have discussed

2. The *Schlesinger, Goldman and Meltzer* cases were well known to students of the subject. Frankfurter and Greene comment on, and do not criticize the first two at pages 109-110; *Meltzer* is listed at p. 249.

could not be specifically enforced by injunctions against whichever party offended. The general doctrine of this line of authority was in no way criticized in the Norris-LaGuardia debates.

II.

THE NORRIS-LA GUARDIA ACT WAS NOT AIMED AT INJUNCTIONS PROHIBITING STRIKES WHICH WERE VIOLATIVE OF NO-STRIKE, COMPULSORY-ARBITRATION CONTRACTS, AND THE STRIKES HERE WERE NOT "LABOR DISPUTES" WITHIN THE MEANING OF NORRIS-LA GUARDIA.

There is not a line of legislative history indicating that when Congress adopted Norris-LaGuardia in 1932 it believed unions had a right to strike in violation of contracts freely entered into not to do so, or that it intended to deprive employers of any remedy against strikes which violated such contractual obligations.

The debates are replete with statements that what Congress was endeavoring to do was to protect the constitutional right of employees freely to assemble and conduct strikes that were not unlawful. Paraphrasing from *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, 458, injunctions against "the failure to adhere to no-strike contracts was not a part and parcel of the abuses against which Norris-LaGuardia was aimed."

It is dialectically possible to read the definition of "labor dispute" in Section 13(c) of Norris-LaGuardia as embracing every conceivable difference that can arise between an employer and employes with respect to the employment. It can be argued that even though the "terms and conditions" have been agreed to for a fixed period, an interim dispute as to whether an employer has lived up to the agreed terms, *i.e.*, here whether the employer owed three

men $2.19, or 73¢ each, is one "concerning" such terms and conditions.

A sounder construction is, we submit, to recognize that the reach of the definition of "labor dispute" is determined by the objectives of the Act. Thus in *Farrand Optical Co.* v. *Local 475*, S. D. N. Y., 143 F. Supp. 527, it was held that where "terms and conditions" have been agreed to, any further dispute about them is not a "labor dispute" within the meaning of Section 13(c).

In such cases as *Virginian Ry.* v. *System Federation*, 300 U. S. 515; *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U. S. 232; *Brotherhood* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30; *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 and *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, this Court in total effect has held that "labor dispute" in Norris-LaGuardia, broad though the term may be, does not comprehend *every dispute* between employers (or their associations) and employees (or their associations or those seeking to represent them), but only those which the history of the Act and its substantive provisions indicate Congress felt should be free from injunctive restraint.

We have come so far since the days of the debates on Norris-LaGuardia that it is important to remember that prior to its passage there was no federal substantive law of labor relations outside of that in the railroad field. Nevertheless, federal courts had issued injunctions which had the effect of curbing organizational and economic activities of unions. The "law" that had been applied in such cases was derived from the Interstate Commerce Act, the Sherman Act, and, in diversity cases, "federal common law" under the doctrine of *Swift* v. *Tyson*, 41 U. S. 1 (*Frankfurter and Greene*, "The Labor Injunction" (1930), pp. 5-17; *Brotherhood* v. *Chicago R. & I. R. Co.*, 353 U. S.

30, 40). It is apparent from *Frankfurter and Greene* and the debates on Norris-LaGuardia that Congress did not believe that any of those sources constituted a valid basis for preventing employees from organizing into unions or striking to better their lot. Nor did it believe the mere fact of organizing constituted illegal conspiracy. Section 4 of the Act, which lists the types of activities which may not be enjoined, supports these conclusions. *Cf. Thornhill v. Alabama*, 310 U. S. 88.

Congress conceived Norris-LaGuardia as a protection of "fundamental rights guaranteed by the Constitution" (Sen. Blaine at 75 Cong. Rec. 4618).

The Majority Report on the Act stated:

> "The primary object of the proposed legislation is to protect labor in the lawful and effective exercise of its conceded rights—to protect, first, the right of free association and, second, the right to advance the lawful object of association." (Sen. Rep. No. 163, 72nd Cong., 1st Sess., p. 10.)

There neither was nor is any "constitutional" or "fundamental" right to violate a lawful contract freely entered into. Or, stated more closely to the language of the report—an unlawful strike is not a "lawful object of association" which it has any "right" whatsoever to advance.

Congress made clear that the federal courts were not deprived of jurisdiction to enjoin acts which were "unlawful" (Section 7). Senator Blaine, one of the sponsors of the legislation, commented:

> "Doubtless there are some labor people who entertain considerable disappointment. *Some would like to have a bill under which no more injunctions could be issued in labor disputes.*" (75 Cong. Rec. 4630; emphasis added.)

Representative LaGuardia, the sponsor of the bill in the House, declared:

> "Gentlemen, this bill does not—and I can not repeat it too many times—this bill does not prevent the court from restraining any *unlawful* act. This bill does prevent the Federal court from being used as an agency for strike-breaking purposes and as an employment agency for scabs to break a *lawful* strike." (75 Cong. Rec. 5478; emphasis added.)

The Majority Report states:

> "It is not sought by this bill to take away from the judicial power any jurisdiction to restrain by injunctive process, unlawful acts or acts of fraud or violence." (Sen. Rep. No. 163, 72nd Cong., 1st Sess., p. 11.)

If the position of the unions in the case at bar is correct, Senator Blaine and Representative LaGuardia, rather than making the statements they actually made, should have said to their colleagues:

> "Gentlemen, we have drawn this bill so tightly and its definitions so limitlessly that even though unions unlawfully break contracts freely entered into not to strike, they cannot be enjoined from continuing that unlawful course of conduct if it is carried on without extreme and uncontrollable violence."

The statement we have just supposed, accurately, if bluntly, states the core of the unions' present position. It is utterly antagonistic to the entire tenor of the Norris-LaGuardia debates.

It goes without saying that if the sponsors of the bill had made such statements to the Congress in 1932, the bill would not have passed. No conscientious member of Congress would have made the representations that Senator Blaine and Representative LaGuardia actually did make if he believed that the bill in fact was so tightly

drawn, or had such a sweeping definition, that it would have the effect envisioned in the imaginary statement we have posited. If that be true, we suggest it is clear that Congress did not intend to prohibit injunctions against unlawful strikes of the variety we are considering.

There is not the slightest evidence that Congress desired to eliminate injunctive enforcement of collectively bargained contracts. As we have seen, there were such contracts in existence in 1932, which had been enforced by injunctions against both strikes and lockouts. There was not a breath of complaint about this practice. It was not one of the evils at which the Act was directed.

Section 7 of Norris-LaGuardia makes it clear that Congress fully intended that where "unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained" that an injunction may issue. A strike in violation of a solemn covenant not to strike is obviously an unlawful act and had been so held consistently prior to passage of Norris-LaGuardia. Congress necessarily legislated in the light of that background law. *U. S.* v. *Sanges*, 144 U. S. 310.

Viewing the Act in totality, we submit that the unlawful acts of unions, their officials or members in conducting strikes in violation of contracts not to do so cannot properly be held to be "labor disputes" which it was the purpose of Norris-LaGuardia to protect from injunctions. If such unlawful activities are not "labor disputes" within the proper meaning of that phrase, then an equity court should pass upon Count III of the complaint at bar without regard to the Act (*Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.*, 363 U. S. 528).

The courts below proceeded upon the premise that the unlawful act of striking in violation of a contract neverthe-

less was a "labor dispute" within the meaning of Norris-LaGuardia. They reached that result by what we believe to be a misinterpretation of *Order of Railroad Telegraphers* v. *Chicago and North Western Railway Co.*, 362 U. S. 330.

Although the *Telegraphers* opinion speaks of the broad definition of "labor dispute" in Section 13 of Norris-LaGuardia, it rests upon the fundamental holding by the Court that the controversy there related to a permissible "effort on the part of the union to change the 'terms' of an existing collective bargaining agreement. The change desired just as plainly referred to 'conditions of employment'" (p. 336). Moreover, the Court found there was nothing in what the union sought to accomplish that was "unlawful" (pp. 340-341).

What the courts below overlooked was that *Telegraphers* was not a retreat from, but a reaffirmation of, *Chicago River* (p. 341). In the parlance of Railway Labor, grievances as to interpretation of, or adherence to, a contract during its term are "minor" disputes which may be carried to, and settled by, the National Railroad Adjustbent Board just as "grievances" in the case at bar may be carried through the contractual grievance procedure and determined ultimately by binding arbitration.

In *Telegraphers* the union wished to bargain with the railroad employer over the matter of station abandonments and protection of its members in such circumstances. Once the Court found, as it did (p. 341), that this was a "bargainable" matter or a "major dispute" within the meaning of Railway Labor the non-applicability of *Chicago River* was clear.

The Court, in *Telegraphers*, did not rest its decision upon a mere fiat or blind adoption of the words "labor dispute" in Norris-LaGuardia, but upon an examination of the nature of the "dispute" and a finding that it did, in

fact, concern the union's desire for a permissible and lawful change in contractual arrangements concerning "terms and conditions" of employment. Such a finding cannot be made here:

Count III of the complaint at bar alleges a succession of strikes, not to change the contractual arrangements between the parties or the terms and conditions of employment in any way whatsoever, but to enforce the strikers' views as to how the agreed "terms and conditions of employment" were to be applied or construed. The forum for settlement of such a difference of opinion was provided by the contract at bar to be the grievance procedure and compulsory arbitration, just as in *Chicago River* similar controversies were to be determined by the National Railroad Adjustment Board. Not only did the contract at bar outlaw the strike as a weapon in such differences of opinion but it provided the "reasonable alternative" (*Chicago River* at p. 41) of binding arbitration.

Moreover, Count III of this case shows, and the motion to dismiss admits, impermissible and unlawful action in derogation of a fixed condition of employment, namely, no participation in strikes.

Telegraphers, properly understood, is not authority for a holding that the strikes here were protected "labor disputes" within a proper interpretation of the definition of "labor disputes" in Norris-LaGuardia—rather, as applied to the facts of this record, it is a reaffirmation of *Chicago River* and persuasive that these admittedly illegal strikes over alleged grievances are not protected "labor disputes" within the meaning of that phrase in Norris-LaGuardia.

Finally, we respectfully suggest that we are arguing simply that Norris-LaGuardia should be construed in the light of its objectives rather than broadly construed to extend beyond them. In this we are aided by the basic

principle that statutes ousting the jurisdiction of courts "are to be strictly interpreted." *State* v. *Sullivan,* 110 N. C. 513, 14 S. E. 796, 798; *Virginian Ry. Co.* v. *System Federation,* 84 F. 2d 641, 647, aff'd 300 U. S. 515.

III.

IN 1947 CONGRESS DECLARED NATIONAL POLICY TO BE THAT COLLECTIVELY BARGAINED CONTRACTS SHOULD (A) CONTAIN SOME METHOD FOR FINAL PEACEFUL ADJUSTMENT OF GRIEVANCES ARISING DURING THEIR TERMS, AND (B) THAT SUCH CONTRACTS MUST BE ENFORCED. IF IT BE ASSUMED THAT NORRIS-LA GUARDIA ORIGINALLY BANNED INJUNCTIVE ENFORCEMENT OF NO-STRIKE CLAUSES SO THAT THERE IS A CONFLICT BETWEEN IT AND THE 1947 AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT EXPRESSING THE POLICY HEREIN STATED, THE LATTER MUST GOVERN.

If it be thought that Norris-LaGuardia standing alone did effectively oust the jurisdiction of federal courts to enforce, by injunctive processes, contracts not to strike, it becomes necessary to consider whether that 1932 legislation is effective against later enactments clearly designed to make no-strike-arbitration contracts enforceable in the federal courts.

In *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, it was held that the provisions of the Railway Labor Act of 1934 looking to peaceful adjudicative settlements of disputes could not be rendered nugatory by the earlier and more general provisions of Norris-LaGuardia. In *Brotherhood* v. *Chicago River & Ind. R. Co.,* 353 U. S. 30, 40, the Court held, "that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved." In *Textile Workers* v.

Lincoln Mills, 353 U. S. 448, the Court held in a case arising under the National Labor Relations Act that jurisdiction to compel arbitration of grievance disputes is not withdrawn by the Norris-LaGuardia Act.

These landmark cases, clearly establishing that Norris-LaGuardia does not stand alone, were followed by *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, *Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.*, 363 U. S. 528, *United Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, all stressing and enforcing the federal policy for the settlement of interim labor disputes by arbitration. The cases are too fresh in the Court's mind to require elaboration by us.

The sum of this line of authority is that the 1947 amendments to the National Labor Relations Act made it clear that it is the policy of the United States that agreements by unions not to strike over interim disputes, but to arbitrate them, must be enforced, and that Norris-LaGuardia should be harmonized with the later legislation.

In the context of this record, we do not think that there is any disharmony between Norris-LaGuardia and the Labor-Management Relations Act of 1947; in any event, the purposes of these acts "are reconcilable" and there can be "an accommodation" of Norris-LaGuardia and Labor-Management Relations just as the Court has found "accommodation" between Norris-LaGuardia and The Railway Labor Act "so that the obvious purpose in the enactment of each is preserved." (*Cf. Brotherhood* v. *Chicago River & Ind. R. Co.*, 353 U. S. 30, 40.)

Let us now see how strong present policy is:

The opinion in *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, emphasizes the importance Congress attached

to Section 301 of the Labor-Management Relations Act. At pages 453 and 454, the opinion points out that,

> "Congress was also interested in promoting collective bargaining that ended with agreements not to strike."

The opinion (and the Appendix attached to Justice Frankfurter's opinion) quotes at length from statements in the debates and the reports of 1947 as to the urgent desire of Congress to make no-strike arbitration agreements fully enforceable. Moreover, it is important to note that *Lincoln Mills* recognized that:

> "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce *these agreements on behalf of or against labor organizations* and that industrial peace can be best obtained only in that way." (p. 455, emphasis supplied.)

This carefully chosen language foreshadows proper decision of the case at bar: It does not say that only the agreement to arbitrate should be enforced, or that only the agreement not to strike should be enforced. It says that each is the *quid pro quo* for the other and that "these agreements" should be enforced. And it is obvious that if the national policy is to succeed it must have two legs to stand on rather than one. Not only must the affirmative covenant of the employer to arbitrate be specifically enforced, but the negative covenant of the union not to strike must be specifically enforced.

The *Lincoln Mills* opinion is centered around Section 301 of the Labor-Management Relations Act. There are other sections of that Act not discussed in the *Lincoln Mills* opinion which add great weight to its teaching:

Congress was so concerned with so-called "quickie" strikes before there had been *bona fide* bargaining that in 1947 it inserted Section 8(d) in the National Labor Relations Act requiring, *inter alia,* that where there was a collective bargaining contract the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify it unless he serves a sixty day written notice upon the other party, offers to meet and confer for the purposes of negotiation, and continues in full force and effect, without resorting to strike or lockout, all terms and conditions of the existing contract for a period of at least sixty days. It is apparent that if Congress outlawed[3] the so-called "quickie" strike called without real prior bargaining and immediately upon the expiration of a contract, *a fortiori* strikes in flat violation of the provisions of a contract during its term would be even more repugnant to the national policy.

Even under the original National Labor Relations Act it had been recognized that a strike or refusal to work in accordance with the terms of a contract was an unlawful repudiation by individual employees of their agreements and justified their discharges (*N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332; *N. L. R. B.* v. *Draper Corp.*, 4 Cir., 145 F. 2d 199). Such strikes were patently illegal and there was no necessity for a legislative declaration in 1947 that they were illegal.

There was, so believed Congress in 1947, persuasive reason for making contracts by unions enforceable against them (See, once more, the *Lincoln-Mills* decision) and for strengthening the policy supporting arbitration of interim disputes. The two objectives—to make the no-strike clause

3. The power of government to limit or regulate the right to strike is unquestioned. *Dorchy* v. *Kansas*, 272 U. S. 306; *International Union* v. *Wisconsin Employment Relations Board*, 336 U. S. 245.

enforceable and to encourage a "reasonable alternative" to strikes over grievances, arbitration—march hand in hand.

Section 301 is the enforcement section. Its primary purpose was to give vitality to no-strike clauses (See the legislative history summarized in the *Lincoln Mills* case appendix, 353 U. S. at 533). Its language plainly does not limit the form of relief. Section 301(a) provides:

> "Suits for violation of contracts * * * may be brought" etc.

Contrast this with the language simultaneously employed in Section 303(b), which permits suits by those injured by secondary boycotts. It provides:

> "Whoever shall be injured in his business or property by reason of any violation of subsection (a) * * * may sue * * * and shall *recover the damages by him sustained and the cost of the suit*" (Emphasis added).

One need go no further than the contrasting language of these sections to see that Congress by Section 301 made either legal or equitable relief available, but under Section 303(b) authorized only legal relief. Labor's insistence on limitation of 303(b) to actions for damages is understandable:

The nature of the actions permitted by the sections is grossly different. An action under 301 can only be for breach of a contract freely entered into—and the section is as broad as it is long, either party can sue. Injunctive enforcement of their own promises poses no real threat to legitimate economic freedom of the parties. And labor was the first to resort to the injunctive remedy (*Lincoln Mills*).

On the other hand, 303 is a tort section—and a tort remedy in the boycott field—a field that always has defied clear definition. The section was not as broad as it was long; it ran solely against unions. And being concerned

with boycotts, it evoked emotional memories of a *bete noire* of labor, *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443. Ample reason then to differentiate.

With respect to the advancement of arbitration, Section 201(c) declared that it is the policy of the United States that certain controversies may be avoided by making available governmental facilities for furnishing assistance to the negotiating parties "in formulating for inclusion within [collective] agreements provisions . . . for the final adjustment of grievances or questions regarding the application or interpretation of such agreements."

Section 203(d) provides:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

The foregoing provisions are explicit. Their importance has been recognized by the Court in *Warrior*, *American Manufacturing*, and *Enterprise Wheel*.

The national policy so strongly favoring industrial arbitration was matured in the Labor-Management Relations Act of 1947, but it was far from being new. It had been recognized emphatically in Section 8 of Norris-LaGuardia. That section received full support by the Court in 1944 in *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad*, 321 U. S. 50. It is that policy and the desirability, in the national interest, of avoiding strikes during the term of a freely bargained collective contract that should, we respectfully submit, determine this case.

The rationale for proper decision here is contained in the *Chicago River* opinion. Shortly after the *Chicago River*

decision Professor Gregory enunciated the following trenchant paragraph:

> "Justice Douglas showed in the *Lincoln Mills* case that the equitable enforcement of collective agreements in general is beyond the reach of Norris-LaGuardia. Last year in the *Chicago River* case the Court held that recourse to direct strike action by a union is enjoinable where Congress had provided an alternative method for handling grievances. The Railway Labor Act has no special provision relaxing the anti-injunction law. I think a contract provision for arbitration, whether or not there is a no-strike clause, might be held as analogous to the congressional provision for handling grievances in that situation. There is a strong federal policy to promote the making of collective agreements and to require compliance with them. Pursuant to this policy, I think the courts should enjoin strikes to enforce grievances even in the absence of no-strike pledges. The *Chicago River* case certainly suggests this result." (Charles O. Gregory, "The Law of the Collective Agreement," *57 Mich. L. R. 635* (1959). For similar views, see for example Cox, "Current Problems in the Law of Grievance Arbitration," *30 Rocky Mt. L. R. 247* (1958); Hays, "The Supreme Court and Labor Law, October Term, 1959," *60 Col. L. R. 901, 918* (1960); Stewart, "No-Strike Clauses in the Federal Courts," *59 Mich. L. R. 673* (1961), to mention but a few.)

Indeed, for at least three reasons, Count III of the complaint at bar presents a stronger case for inapplicability of Norris-LaGuardia and for the issuance of an injunction than did *Chicago River*.

First, here we have an unquestioned voluntary, express covenant not to strike given almost contemporaneously with the walkouts which followed it. In *Chicago River* there was no express covenant not to strike. The Court found that the promise not to strike was inherent in the

position the Railroad Brotherhoods had taken when they secured the 1934 amendments of the Railway Labor Act.

Second, in the case at bar we have an exceptionally strong, but voluntarily granted, grievance procedure. The contract at bar says that alleged grievances "*must*" be submitted to the grievance procedure. There is no equivalent mandatory language in the Railway Labor Act.

Third, Chicago River, decided under the Railway Labor Act, was without the aid of the emphatic provisions of Sections 301, 201, and 203 of the National Labor Relations Act.

Just as the Court said in *Chicago River* (p. 42) that "both [Norris-LaGuardia and Railway Labor] were adopted as a part of a pattern of labor legislation" so it necessarily must be said here that "both [Norris-LaGuardia and the Labor-Management Relations Act of 1947] were adopted as a part of a pattern of labor legislation." And the Labor-Management Relations Act of 1947 speaks more strongly for the principles enunciated in the *Chicago River* decision than does the Railway Labor Act.

Relating the principles of the legislation and judicial decisions we have referred to in this point to the facts of this record, we find:

1. The contract was in full accord with the national policy: it provided (a) there should be no strikes and (b) alleged grievances "must" (R. 19, p. 31 of contract) be handled through a grievance procedure culminating in compulsory arbitration.

2. The parties clearly provided a "reasonable substitute" (cf. *Chicago River* at p. 41) for strikes as a means of determining grievances during the term of the agreement.

3. This case, in the field of general industry subject to the National Labor Relations Act, is the counterpart of *Chicago River* in the railroad field. In the railroad

field employees *may* take grievances ("minor disputes") to the Railroad Adjustment Board. In this case employees *must* take grievances, if they believe them valid, into a grievance procedure terminating in arbitration. Every reason of policy that required the *Chicago River* decision, and the desirability of symmetry in the basic labor law of the country, require a like decision here. It would be a disservice to the nation, a frustration of Congressional intent, and a shocking discrimination against railroad employees to hold that they may be enjoined from striking during the terms of their contracts, but that industrial employees may not similarly be enjoined even though they have expressly contracted not to do so.

IV.

IF THE NORRIS-LA GUARDIA ACT WERE CONSTRUED TO PERMIT INJUNCTIVE ENFORCEMENT AGAINST EMPLOYERS OF THEIR COVENANT TO ARBITRATE BUT TO FORBID INJUNCTIVE ENFORCEMENT AGAINST EMPLOYEES (AND THEIR ORGANIZATIONS) OF THEIR CORRELATIVE COVENANT NOT TO STRIKE, SUCH CONSTRUCTION WOULD RENDER THE ACT UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

This point may be shortly stated:

The proponents of Norris-LaGuardia were not seriously worried over an attack on its constitutionality on the theory that it denied employers equal protection of the laws. The proponents were persuaded, first that the "equality" clause of the Fourteenth Amendment does not limit Congressional but only state legislation." Frankfurter & Greene, *The Labor Injunction* (1930), p. 220. Secondly, that it was "hardly to be assumed that the application given in *Truax* v. *Corrigan* [257 U. S. 312], to the equal protection clause of the Fourteenth Amendment will be imposed upon the due process clause of the Fifth Amend-

ment" (*Ibid.*). *Truax* v. *Corrigan* was criticized on the general ground that Mr. Truax, an employer and operator of a restaurant in Arizona, was not treated disparately by Arizona with relation to other employers, whether owners of restaurants or otherwise. In brief, it was argued that *Truax* v. *Corrigan* improperly applied the equal protection clause of the Fourteenth Amendment, but that in any event that Amendment did not apply to the federal government, which therefore was free to withhold, by Norris-LaGuardia, the injunctive remedy from employers.

Whether the criticism of the application of the equal protection clause made in *Truax* v. *Corrigan* and the constitutional arguments originally advanced in favor of Norris-LaGuardia on this score were valid, need no longer be debated, for changed circumstances and the facts of this record now pose a deeper and more important constitutional question as to equal protection.[4]

Although the words "equal protection of the laws" do not appear in the Fifth Amendment, there always has been recognition that the spirit of those words inheres in the words "due process of law." *Truax* v. *Corrigan*, although pointing out the difference in the verbiage of the Fifth and Fourteenth Amendments, recognized also, and the fact never has been disputed, that

> "Our whole system of law is predicated on the general fundamental principle of equality of application of the law." (257 U. S. at 332.)

Since *Truax* v. *Corrigan*, events have strengthened the foregoing observation:

First, when this Court held in the *Labor Board Cases*, 301 U. S. 1, and in the Social Security Act cases (*Helvering* v. *Davis*, 301 U. S. 619, and *Steward Machine Co.* v. *Davis*,

4. "While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning." *Sweezy* v. *New Hampshire*, 354 U. S. 234, 266.

301 U. S. 548) that local manufacturing fell within the commerce clause and that the welfare clause was a grant of legislative authority, it sanctioned the entrance of the federal government into the intimate and daily affairs of the national citizenry to an extent theretofore unknown. It scarcely could be said with honor that the Court would permit the federal government to enter into such delicate and detailed fields with a less fastidious obligation of equal treatment of citizens than the Constitution required of state governments.

Secondly, when the problem of racial discrimination arose in public schools, it was solved for the forty-eight states in *Brown* v. *Board of Education,* 347 U. S. 483, under the equal protection guarantee of the Fourteenth Amendment. However, the Fourteenth Amendment did not apply to the District of Columbia. Yet, in *Bolling* v. *Sharpe,* 347 U. S. 497, racial discrimination was held as invalid in the District of Columbia under the due process clause of the Fifth Amendment as it was so held in the states under the equal protection clause of the Fourteenth. In short, although the Court pointed out in *Bolling* v. *Sharpe* that the two phrases "equal protection of the laws" and "due process of law" are not always interchangeable, it nevertheless recognized that it would be "unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it did upon state governments. *Bolling* v. *Sharpe* has read "equal protection of the laws" into the Fifth Amendment for all time.

In short, by the course of events, the concept of equal protection of the laws is now as binding on the Federal Government as it is on state governments.

If discrimination on the ground of race is equally obnoxious to the Fifth and Fourteenth Amendments, we respectfully suggest it follows that discrimination upon the basis of economic class, or discrimination between em-

ployees upon the basis of whether they are employed in general industry or in the transportation industry, is equally obnoxious to the Fifth Amendment. The application of those postulates to this case is clear:

This Court has held that employees in industries governed by the Railway Labor Act may be enjoined from striking over grievances, Norris-LaGuardia to the supposed contrary notwithstanding (*Chicago River*).

This Court has held that contracts by which employees in general industry agree not to strike and employees agree to accept the results of arbitration decisions as to grievances during the term of a contract may, at the instance of the employees, be enforced by injunctions against employers compelling them to arbitrate, Norris-LaGuardia to the supposed contrary notwithstanding (*Lincoln Mills*).

The double discrimination and double unequal protection of the laws that would result if it were held that industrial employees could not, unlike their brothers in the railroad industry, be enjoined from striking during the terms of their contracts, and that employers could not have injunctive enforcement of the *quid pro quo* no-strike covenant of the identical contract of which the arbitration provisions are specifically enforceable, is manifest.

Or stated another way, if an injunction against industrial employees may not be entered under the circumstances here shown then railroad employees would be discriminated against and denied equal protection; employers would be discriminated against and denied equal protection for they would be denied the effective enforcement of the *quid* which employees are allowed of the *quo*.

With Norris-LaGuardia construed as it now is construed viz., not to forbid injunctions in railroad "minor disputes" and not to forbid injunctions requiring employers to arbitrate grievances, it is a matter of constitutional neces-

sity that it be held not to preclude injunctions enforcing no-strike covenants. Any other holding would, we submit, render Norris-LaGuardia obnoxious to the concept of equal protection of the laws which inheres in the Fifth Amendment.

V.

THE LEGAL REMEDY IS INADEQUATE. THE INJUNCTIVE REMEDY IS SOCIALLY PREFERABLE.

There can be no serious question on this point but its growing importance should not be overlooked. As we have seen, it was recognized pre-Norris-LaGuardia that the legal remedy was inadequate. The reasons are manifold:

In a long strike involving many employees damages can become, to common knowledge, very high indeed, yet the difficulties of proving them precisely are insurmountable. In a strike in which the business is only temporarily discommoded accountants can wrangle endlessly over what items of loss and cost are attributable to the strike and what are not. Loss of customer confidence in the ability of the employer to furnish his product on time, from which stems future losses of business, although a well known fact, is extremely difficult of legal proof. The diversion of managerial employees from productive pursuits into efforts to settle a walkout again is a loss difficult of precise evaluation. These are only some of the problems inherent in the legal remedy.

More important to the nation than problems of proof of damages is that a damage action after an event does not secure tranquillity of uninterrupted production that is the goal of Congress. What the country wants is performance of the no-strike pledge -not damages to the employer in lieu thereof. And damages to the employer, even assuming they can be assessed adequately, in no way recompense

the non-assenting innocent employees who are dragged into, or idled by, nearly every illegal strike.

The injunction, which stops the wrong and contains the damages, is a far more merciful and beneficent remedy than a damage award entered long after the sorry event.

In the case at bar the fact that the *ad damnum* in the law counts was placed at only $12,500 should deceive no one into thinking that such was the full extent of the employer's loss from the February 1959 stoppage. The *ad damnum* was placed at that low figure to demonstrate that the employer was not out to "break" the union, but simply to secure responsibility. It was also placed at that low figure so that, upon trial, the employer could readily prove up the stated amount through items as to which there could be no possible legal controversy.

A no-strike covenant is a negative covenant. Negative covenants historically have been favored subjects for specific enforcement, for in no other way can the beneficiary of such a covenant obtain what he really bargained for.

The problem of illegal strikes is important. A recent study indicates that some form of no-strike clause appears in about 94% of union contracts.[5] According to the same source, 91% of such contracts contain enforceable arbitration provisions and an additional 3% permit arbitration by mutual agreement.

The foregoing statistics demonstrate that the public policy of encouraging settlement of a grievance by arbitration has been implemented so far as employers are concerned, not merely on paper, but in reality through this Court's decisions in *Lincoln Mills, Warrior* and similar cases. However, the availability of arbitration has not

5. *Basic Patterns in Union Contracts*, Bureau of National Affairs, 1961, p. 77:1.

brought about adherence to the correlative no-strike clauses. This case is a startling example, for Count III shows that in the period of 19 months this plant suffered 9 illegal strikes, some of them of considerable severity, and all over matters which could have gone to arbitration.

There are no definitive statistics as to the numbers of illegal strikes. The most recent study of the Bureau of Labor Statistics concluded that 24.1% of the workers involved in strikes in the last half of 1960 were involved in "disputes arising during the term of the agreement." (*Analysis of Work Stoppages 1960*, Bulletin No. 1302, Bureau of Labor Statistics (1961), p. 5.) That figure does not include strikes arising out of legitimate "wage reopeners" during the term of a contract nor does it include work stoppages involving less than 6 workers or not lasting a full shift or longer. Since many so-called wildcat strikes last for only a few hours and are settled by some accommodation of the strikers, there are necessarily a great many that are not included in the Bureau of Labor Statistics computation.

A student recently has reported that in such basic industries as steel, automobiles and rubber every company has faced the issue of wildcat strikes in serious proportions during the last 20 years.[6] This case proves the oil industry has not been immune. The same authority reports that a recent survey of over 150 important companies revealed that 60% of them listed wildcat strikes as their most important recent labor problem.

Another writer reports:

> "With this growing maturity we might well expect that the most unrestrained and least disciplined weapon in an industrial power struggle—the wildcat strike—would completely disappear. • • • Yet the

6. "Taming Wildcat Strikes," Mangum, *Harvard Business Review*, March-April 1960, p. 88.

> wildcat strike has not disappeared, nor is there any evidence that it will in the foreseeable future." ("Wildcat Strikes," Sayles, *Harvard Business Review*, November-December, 1954, p. 42.)

Professors Slichter, Healey and Livernash of Harvard conducted a three-year study under the sponsorship of the Brookings Institution resulting in a book published in 1960 entitled *The Impact of Collective Bargaining on Management*. They report at page 663:

> "Wildcat strikes, that is, strikes in violation of contract, and other union pressure tactics have not been sufficiently recognized as a distinct and important aspect of the development and evolution of union-management relations. * * *
>
> "An open question is whether the use of force, direct and indirect, in contract administration has not been more significant than have strikes over the negotiations of contracts. Actually no accurate measurement of such influence can be made, but it is clear that certain plants and companies have become noncompetitive not through concessions granted in negotiation but through the cumulative effect of concessions granted in contract administration."

The sum of the matter is that the lay investigators of the subject have all reported that the problem is serious, that the various self-help remedies of discharge and layoff are difficult of application because of the problem of distinguishing between the leaders of such illegal activities and those who were merely swept along with the tide. It is obvious that these remedies do not work for if they did the problem would have disappeared.

It is respectfully suggested that from the point of view of national stability the most effective remedy, and the one which does the least harm to the future relations of the parties, is the injunction, which stops the trouble before it progresses too far.

BRIEF IN NO. 430.

QUESTIONS PRESENTED.

1. Does Section 301 of the Taft-Hartley Act extinguish the right of employers to sue individual employees for inducing breaches of union contracts, for breaching their individual contracts, and for inducing other employees to breach their individual contracts?
2. Does the contract contain a waiver by the employer of its right to sue and a promise by it to submit to arbitration any claims, tort or contract, which it may have against the union or individual employees arising out of breaches of the promises (a) not to strike over, but (b) to arbitrate asserted grievances against the employer?
3. Does a union which, to the damage of an employer, violates both the arbitration and no-strike clauses of a contract with it, have standing to insist that its conduct in that regard be adjudicated in arbitration rather than in a Federal District Court pursuant to the provisions of Section 301 of the Labor-Management Relations Act of 1947?

STATEMENT OF CASE.

We are in violent disagreement with defendants' assertions: that following the work stoppage of Feb. 13-14, 1959, the employer invoked disciplinary action against 12 of the 24 individual defendants; that the local union has denied that these allegedly "disciplined employees" were responsible for the work stoppage; and that an arbitration is presently pending to determine all of these matters and also, presumably, the remedy which the employer

should be afforded because of the breach of the no-strike clause. Those assertions, which form the predicate for much of defendants' brief, cannot be supported in the record.

There is nothing showing that any employees were disciplined for participation in the strike (and they were not), or that there is any arbitration pending (under the contract provisions or otherwise) that will settle the questions raised by this action or afford plaintiff the relief which only a court can give. The true nature of the written grievances which were filed is quickly resolved by examination of them (R. 33-41). None refer to the strike, nor do they allege that anyone was disciplined. The sole subject matters of the grievances are claims for "Loss of Time" or "Loss of Pay" (R. 37-41).

Despite the assertion in defendants' motion to stay that none of the defendants failed to follow the procedure for settlement or arbitration of grievances there actually is no dispute but that they did fail so to do. The work stoppage did occur on February 13-14, 1959 (defendants' brief so admits), the asserted grievances which were the subject matter of the strike ("docking" three men the aggregate sum of $2.19 for being late) were not filed until more than two weeks after the strike—March 4, 1959 (R. 35-36).

The assertions of the motion to stay are circumscribed by its supposedly supporting affidavit of Tyler Swanson (R. 24-25), which attempts to characterize certain other grievances which were filed at various times after the stoppage, and some after this action had been instituted. Swanson failed to attach copies of these grievances. The incorrect assertion of his affidavit that the parties "are presently agreed to submit the issues raised in the Complaint" to arbitration (R. 23, Par. 3) is contradicted by the counteraffidavit of Robert D. Clark (R. 33-34), which is validated by attachment of the actual grievance forms (R. 35-41).

The Clark affidavit and attachments completely refute Swanson's conclusions. They show:

> The three riggers, whose claim that they had improperly been docked 15 minutes' pay precipitated the walkout, did not file grievances for their pay until March 4, 1959, more than two weeks after the strike (R. 33).
>
> The other grievances filed by 14 of the 24 individual defendants do not allege any "discipline" but simply advance claims for "loss of pay" or "loss of time" for performance of regular work duties on February 13, and, in some cases, February 16, 1959 (R. 33-34, 37-41). One of the grievances also asserts that the 7 grievants therein are entitled to pay on February 13 and 16 for performing regular work and for "processing grievances" (R. 34, 38).

It is apparent that a decision as to whether the three riggers were docked 15 minutes' pay properly will not settle any of the issues in this case. It is apparent likewise that if in an arbitration it were established that any of the other grievants had performed regular work, or proper union activity, on February 13 or 16 for which they were not paid, that no issue in this case would be resolved.

SUMMARY OF ARGUMENT

Count II States a Valid Cause of Action Against the Individual Defendants For Their Individual Acts Which Were Both Breaches of the No-Strike Clause and Were Common Law Torts Because:

The individual defendants are bound by the provisions of the collective contract. In addition, the individual defendants are under a duty not to induce other employees or their union to breach the collective agreement. The brief of the AFL-CIO herein which argues (p. 19) that individual employees should have all the benefits of a collective contract, but that its no-strike clause should not be regarded as "an individual obligation binding on employees who may engage in a wildcat strike or other peaceful work stoppage" does violence to contract law and is a shocking invitation to industrial anarchy. A promise not to strike is wholly valueless unless it is binding upon the employees covered by the contract as well as their union for there may be strikes without the participation of the bargaining representative, but there can never be a strike without employee participation.

Count II was embodied in the complaint because of the probability that the unions in answering Count I will assert that the strike was the result of solely *individual* activity which created no union liability.

Defendants' argument that because Section 301 created a right to sue a union for breach of contract it thereby extinguished the right to sue individual tortfeasors or individual contract breakers is an obvious *non sequitur*. Section 301 was passed on the assurance that it destroyed no existing remedies but created a simple method for suing a

union in contract and satisfying any judgment recovered out of union rather than individual assets.

Defendants further argue that because, in a certain limited class of cases under the New York minority view, officers or agents of a corporation cannot be sued for inducing corporate breaches of contract, union officials should not be held responsible for inducing union breaches. This is unsound: *first*, because Section 301 did not purport for all purposes to make a union the equivalent of a corporation; *second*, because this view is a minority view which is repudiated in most jurisdictions; and *third*, because even in New York if a corporate officer acts maliciously and for no proper purpose, as it is alleged and admitted the union officials did here, he may be sued.

Defendants' various other objections to the imposition of individual liability for individual derelictions are without merit: Extinguishing individual liability would have the effect of undermining Section 301 because: (a) employer inflicted discipline is not an effective remedy for wildcat strikes, nor does it make an employer whole; and (b) covert breaches by the union could rarely be proved.

The National Labor Relations Act does not pre-empt the jurisdiction of Federal or State Courts to decide actions for breaches of a collective agreement.

Damage actions against individuals for breaches of their commitments under a no-strike clause implement the policy of Section 301.

Damage actions against individual employees will not undercut a union's right of "exclusive representation" but will fortify it; nor will such actions detract from the uniformity of Federal Law.

The Action Should Not Be Stayed Because:

This lawsuit is precisely the type which Section 301 of Taft-Hartley was intended to make available to cure the exact breach complained of. Since 1947 parties who wished to limit union liability for breach of no-strike clauses have known how to do so; such was not done here.

One cannot be compelled to arbitrate a question unless he has agreed to. The contract here does not contain any promise by plaintiff not to sue, but to arbitrate, claims against the union or individual defendants.

The grievance and arbitration procedures of this contract could not be set in motion by the employer and the contract does not contemplate that the employer must obtain the consent of the grievance committee before disciplining employees who are late for work, or that it must submit claims for damages arising from violation of the no-strike clause to arbitration.

Under this contract the employer has the right, subject to the restrictions of the contract, to run the business. When the right to manage allegedly has been exercised in violation of some provision of the agreement, a "grievance" may be presented by or on behalf of employees. The employer does not have to go through the grievance procedure before making a managerial decision, here to dock three employees; however, it makes that decision subject to corrective action if it acts erroneously.

Nor does the contractual "Grievance and Arbitration Procedure" contain any provisions for the processing of employer grievances or by which the employer might initiate arbitration.

Even if plaintiff had a right to initiate grievances or arbitrations against the union or its members, defendants would have no standing to stay the suit and insist on such

arbitration because they first spurned the grievance procedure and violated both the arbitration and no-strike clauses of the contract, thus depriving the employer of the only consideration it had for entering into the contract, frustrating the purpose of the agreement, and waiving their right, if any, to insist upon arbitration.

There is no support whatsoever in the record for the assertion that plaintiff and defendant have (wholly apart from the contract) entered into a valid and binding submission agreement to refer the damage claims advanced in the complaint to arbitration. Defendants' unilateral acts in filing grievances of any nature cannot create and do not constitute such a submission agreement.

ARGUMENT.

I.

COUNT II STATES A VALID CAUSE OF ACTION AGAINST THE INDIVIDUAL DEFENDANTS FOR THEIR INDIVIDUAL ACTS WHICH WERE BOTH BREACHES OF THE NO-STRIKE CLAUSE AND COMMON LAW TORTS.

Count II names as defendants 24 of plaintiff's employees (all of whom were also union committeemen) who, in violation of their individual obligations, fomented, caused and participated in this strike (R. 12-14).

The complaint was framed with Count I against the unions and Count II against the individuals because of the fact that unions frequently deny responsibility for wildcat strikes, claiming that such stoppages are "spontaneous" or caused by a dissident faction within the union. That a strike did occur and that someone was responsible for it is a verity.

Here, it may fairly be assumed the unions ultimately may assert that the activities of the committeemen and other employees were not union action and do not create union liability. Counts I and II are alternative, not only because plaintiff could not recover damages twice for the same breach, but also because the theories of the counts are different. If the strike was caused by the unions, plaintiff should recover under Count I; if, on the other hand, the activities of the individual defendants are shown to have been solely individual activity, then plaintiff is entitled to recover from the individual defendants. Possibly the facts on trial may show liability under both counts.

The validity of Count II raises the following questions:

(1) Are the employees covered by a collective bargaining agreement under a duty to abide by its terms, including the no-strike and arbitration provisions? (2) Does the complaint allege a violation of these duties? and (3) Would an award of damages against the individual defendants conflict with the provisions of the Labor-Management Relations Act, 1947?

A. The Individual Defendants Had a Duty Not to Foment, Cause or Participate In a Strike.

The AFL-CIO advances a proposition that, if accepted, would be destructive of all real responsibility under collective agreements, or enforceability of them. It asserts that the no-strike obligation of a collectively bargained contract should not be treated "as an individual obligation binding on employees who may engage in a wildcat strike or other peaceful work stoppage" (Br. p. 19). Acceptance of this proposition, or any substantial part of it, would do the country immeasurable harm. With the individual *right* to select a bargaining agent and to secure benefits through it must go the individual *duty* to accept correlative obligations created by or arising from the contract the collective agent makes on behalf of the individual employees.

1. The Individual Defendants Had an Obligation Not to Breach the No-Strike Clause of the Contract and a Further Contractual Duty Not to Induce Such Breaches by Others.

Under Section 9(a) of the National Labor Relations Act (29 USC Sec. 159) the collective bargaining agent is empowered to make a collective bargaining agreement for all employees in the bargaining unit (supposedly conferring innumerable benefits on them) which is binding on them "in respect to rates of pay, wages, hours of employment, or other conditions of employment", and which be-

comes a part of each employee's individual contract with the employer. The power thus granted is "exclusive" and precludes individual employees, whether members of the union or not, from adjusting a grievance with their employer in a fashion "inconsistent with the terms of a collective-bargaining contract" (*Ibid.*).

There has been much theorizing as to whether, in strict legal theory, the individual employee becomes a third party beneficiary to the collective contract or whether the collective contract, though not signed by or naming the individuals, is one directly between the employer and them negotiated by their collective agent. This Court has discussed these, and other theories in *J. I. Case & Co.* v. *N. L. R. B.*, 321 U. S. 332, and in *Ass'n of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437. It is not necessary, for the purposes of this case, to debate these theories, for it is uniformly agreed that the collective contract, on whatever theory, runs to, and binds, the individual employee. Thus, in *J. I. Case & Co.* v. *N. L. R. B.*, 321 U. S. 332, 335, the Court said:

> "After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. *But the terms of the employment already have been traded out.* There is little left to individual agreement except the act of hiring. * * *
>
> "* * * *The individual hiring contract is subsidiary to the terms of the trade agreement* and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates." (Emphasis added.)

The Court of Appeals for the Third Circuit said in the *Westinghouse* case (270 F. 2d 623, 627):

> "The terms of the collective contract thus become part of the individual contract of employment * * *."

In *N. L. R. B.* v. *Cummer-Graham Company*, 5 Cir., 279 F. 2d 757, 759, the court said:

> "Labor organizations, while engaged in collective bargaining, both while the bargain is being negotiated and when it has been agreed upon and is being closed, act in a representative capacity and on behalf of the employees in the bargaining unit. The employees are the real parties in interest. They are, in a very real sense, parties to the agreement whether or not it be so recited."

State courts, by a variety of reasons, reach the same result, namely that the individual has the benefit of, and is bound by the collective agreement. Thus, *Young* v. *Klausner Cooperage Company*, 164 Ohio 489, 132 N. E. 2d 206, was a suit brought by a former employee to recover a retroactive wage increase after having walked out in violation of the no-strike clause. The court held plaintiff's breach prevented recovery, saying (p. 208):

> "* * * plaintiff as a union member was represented by his union in the agreements made by it and defendant, and *was bound by their terms* * * * Plaintiff breached the [no-strike] agreement by striking on March 27, 1952, before the retroactive wage increase was authorized * * * This deliberate and wilful conduct on his part operated as a forfeiture of the additional pay to which he might otherwise have been entitled." (Emphasis added.)

The New Jersey Supreme Court in *Owens* v. *Press Publishing Company*, 20 N. J. 537, 120 A. 2d 442, said (p. 448):

> "In sum, it is said that the common law 'imports an individual contract of employment wherever there is an employer-employee relationship,' and each plain-

tiff (employee) 'had an individual contract of employment which embodied as conditions of employment the provisions of the collective bargaining contract,' (citing cases)."

In *McLean Distributing Company* v. *Brewery and Beverage Drivers, et al.*, 254 Minn. 204, 94 N. W. 2d 514, cert. den., 360 U. S. 917, the court observed (p. 525):

> "In dealing with a contract between an employer and a union, acting as an exclusive bargaining agent for all employees of such employer, it is necessary to have in mind the nature of such agreement. To begin with, the union acts as the agent for the employees presently employed, and *they are as much bound by the contract executed in their behalf by the union as if they had executed it themselves.* Where, as here, the contract covers all employees in a designated category and gives to the employer the right to secure and hire new employees after the execution of the contract, such new employees, as they are hired, must be held to have accepted the terms of the contract under which they are employed so as to be bound by it as much as if they were so employed when the contract was executed. *In other words, by accepting employment under a contract, they adopt and ratify the terms thereof.* They cannot accept employment under the terms of an existing contract and at the same time secretly repudiate it." (Emphasis added.)

See also *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Lamon* v. *Georgia Southern & Florida Railway Co.*, 212 Ga. 63, 90 S. E. 2d 658 and *Whiting Milk Companies* v. *Grondin*, 282 Mass. 41, 184 N. E. 379, showing how seriously a collective contract may affect the rights and obligations of individual employees.

In the instant case the Court of Appeals concluded:

> "Whether these individuals are regarded 'somewhat as' third party beneficiaries to the collective contract or that contract, though not signed by or naming them,

> is one directly between them and the employer, negotiated by their agent, because incorporated in the individual contract of hire, they are bound by its provisions. * * * And we recognize that each of the individual defendants may have no duty to remain in plaintiff's employ for any given period. But, under the contract, he does have a binding contractual obligation not to strike or engage in a work stoppage in violation of the no-strike clause. And he has a duty not to induce others to do so." (R. 73.)

To that we would add this observation: A promise not to strike is wholly valueless unless it is binding upon the employees covered by the contract as well as their bargaining representative. Only employees may strike: a union may "call a strike", but there can be none without employee participation. Conversely, there may be strikes without union participation, but there cannot be a strike without employee participation.

Despite the sweeping position taken by the AFL-CIO we do not understand defendants themselves seriously to controvert the proposition that the individual employee is bound by the collective agreement. Defendants concede:

> "We do not quarrel with the contention that the relationship of members of a bargaining unit to their employer, are governed by the bargaining agreement entered into on their behalf by their union." (Br., p. 60.)

Nevertheless, as we show below, both defendants and the AFL-CIO seek to prevent any enforcement of these duties.

2. Under the Common Law of Indiana, Inducement of Breach of Contract Is Tortious.

Wholly apart from the obligations placed upon them by the collective agreement, the individual defendants had a duty not to induce plaintiff's employees to breach their obligation not to strike. The Court of Appeals concluded:

> "In addition Count II alleges that the individual defendants induced other employees to breach the agreement. Indiana, under the doctrine of *Lumley* v. *Gye*, 2 El. & Bl. 216, 118 Eng. Reprint 749, recognizes liability for malicious interference with or inducement of breach of a contract and it has applied that doctrine in a situation where a defendant charged with inducing a breach of contract is [fol. 181] a party to the contract. *Wade* v. *Culp*, 107 Ind. App. 503, 23 N. E. 2d 615.
>
> "Thus, apart from alleging a contract liability of each individual defendant for participating in a work stoppage in violation of his contractual obligation not to do so, Count II also alleges a tort liability recognized under Indiana law—tortious interference with and inducement of breach of contract obligations." (R. 74.)

The Court's holding is fully in accord with Indiana law. *Jackson* v. *Stanfield*, 137 Ind. 592, 37 N. E. 14, 23 LRA 588. Neither in defendants' brief nor in the *amicus'* brief is there any question that the Court of Appeals correctly interpreted Indiana law.

3. The Duty Not to Interfere with Contractual Relations Is Also Applicable to Union Officers as Well as Members.

Defendants contend that Count II does not allege a cause of action based on the individual defendant's malicious inducement to secure the union's breach of the collective agreement. They assert that it is the law (in New York) that officers of a corporation (or union) may not be held liable for inducing the corporation (or union) to breach a contract, citing *Wilson & Co.* v. *United Packinghouse Workers of America*, N. D. Iowa, 181 F. Supp. 809 and *Hicks* v. *Haight*, 171 Misc. 151, 11 N. Y. S. 2d 912.

The two fundamental errors in this contention are (1) a voluntary labor organization is not the equivalent for all purposes of a corporation, and (2) not even in New York,

which is in the minority, is an officer or agent of a corporation immunized from all personal liability for his individual acts in inducing his principal to breach a contract. Defendants admit in their brief that an agent or officer of a corporation can be held individually liable for such tortious conduct when there is a showing that the motive was personal aggrandizement (p. 79). Decisions rendered after *Hicks* make it clear that even in New York if a corporate officer commits independent torts or predatory acts directed at another, he may not seek refuge behind the protective shield of his artificial principal.[7]

In *Ehrlich* v. *Alper* (*Ibid.*) the court noted that the New York view was contrary to other jurisdictions and attempted to explain the difference as follows:

> "In other jurisdictions it has been held that officers of a corporation may be held liable individually for malicious inducement of breach of contract without a further showing either of personal profit or separate tort committed in conjunction with the breach, but in this state the authorities hold that plaintiff must allege and prove that one or the other of these conditions obtains." (145 N. Y. S. 2d at 252.)

As the Court of Appeals concluded, the District Court in *Wilson* erred in not only applying a minority view, mistakenly construed, concerning the liability of officers of corporations (and unions), but also was guilty of a *non sequitur* or of reasoning from a particular to a generality as is shown in *Baun* v. *Lumber and Saw Mill Workers*

7. *Remy Beverage, Inc., et al.* v. *Myer, et al.*, 269 App. Div. 909, 56 N. Y. S. 2d 828; *Ehrlich* v. *Alper*, 145 N. Y. S. 2d 252, affd. 1 App. Div. 2d 875, 149 N. Y. S. 2d 562; *Buckley* v. *112 Central Park South*, 285 App. Div. 331, 136 N. Y. S. 2d 233; *A. S. Rampell, Inc.* v. *Hyster Co.*, 1 Misc. 2d 788, 148 N. Y. S. 2d 102; Fletcher, *Corporations*, Vol. 3, § 1,001; *Vassardakis* v. *Parish*, S. D. N. Y., 36 F. Supp. 1002; *Culbertson* v. *Ellis, et al.*, C. C. D. Ind., 6 Fed. Cases No. 3461; Restatement of Agency, 2d, Section 343. The New York view has been often criticized, *e.g.*, Comment, 48 Harv. L. R. 298 (1934); 45 Mich. L. R. 634 (1947).

Union, et al., 46 Wash. 2d 645, 284 P. 2d 275, in which the identical argument contained in *Wilson* was squarely rejected (284 P. 2d at 286):

> "The law unquestionably is that in such a case as this the officers and members of a union or other similar unincorporated association are liable for acts which they individually commit or participate in or authorize or assent to or ratify (citing cases).
>
> "We find no merit in the contention that the Labor Management Relations Act, 29 U. S. C. A. §§ 185 and 187, does not permit a judgment against the individual union member. What the statute relied on says (and it is limited to money judgments in district courts of the United States) is that a judgment against a labor organization shall not be enforcible against its members, which is a far cry from saying that a judgment cannot be recovered against individual members in consequence of their individual actions. The argument is a complete *non sequitur.*"

The complaint at bar alleges, and the motion to dismiss admits, that the individual defendants maliciously conspiring to cause the plaintiff expense and damage, to induce breaches of the collective contract, and to interfere with performance thereof, took various steps to foment the work stoppage. This allegation states a cause of action under the law of any state with respect either to corporate or union officials.

B. Count II Alleges Violations of the Various Duties Which the Individual Defendants Owed to Plaintiff.

This is clear from the original wording of paragraph 9 of Count II, which (italics added) is as follows:

> "9. * * * the individual defendants and each of them, contrary to their duty to plaintiff to abide by said contract, and maliciously confederating and conspiring together to cause the plaintiff expense and

damage, and to induce breaches of the said contract, and to interfere with performance thereof by the said labor organizations *and the affected employees*, and to cause *breaches* thereof, individually and as officers, committeemen and agents of the said labor organizations, *fomented, assisted and participated in a strike* or work stoppage by approximately 999 of the approximate 1700 employees within the bargaining unit represented by the Local Union at said East Chicago refinery over asserted pay claims on behalf of three members of the said bargaining unit aggregating $2.19, which asserted claims could, and, if valid, should have been the subject of a grievance under Article XXVI of the said contract" (R. 13).

To remove any doubt about the matter, plaintiff tendered an Amended Count II (R. 56-58) which specifically alleged that the collective contract formed a part of the individual contracts of the approximate 1700 employees in the bargaining unit (Par. 6), and specifically averred that there were breaches of approximately 999 individual contracts (Par. 9).

What is important is that the count in either form was not founded solely upon breaches by the unions of the collective contract or inducement of union breaches. Count II is far broader and alleges several quite distinct and well recognized legal bases of action:

(1) That the individual defendants breached their own individual obligations under the no-strike clause by participating in the work stoppages.

(2) That the individual defendants engaged in conduct which was both violative of the no-strike clause and tortious in inducing other employees to strike, and in conspiring together to do so; and

(3) That the individual defendants engaged in conduct that was both in violation of the no-strike clause and tortious in inducing the unions to breach their obligation under the no-strike clause.

The Court of Appeals so interpreted Count II (R. 72-76), was manifestly correct in doing so, and we do not believe that defendants or *amicus* question the validity of this interpretation.

C. The Recovery of Damages from Individual Employees for Individual Breaches of Their Obligations Under a No-Strike Contract, or for Individual Interference with Such Contracts, Implements the Federal Policy of Promoting Labor Peace and Is a Necessary Concomitant of That Policy.

Defendants and the AFL-CIO protest that the traditional recovery of such damages as are due should not be allowed. They vehemently assert that such a remedy is "unnecessary" (AFL-CIO brief, p. 4), "radical" (*Id.* at p. 5), would not promote "healthy labor-management relations" (*Ibid.*), conflicts with our federal labor policy in a variety of ways (*Id.* at 8-13; Def. Br.), and that there is no such federal cause of action (Def. Br., p. 52).

Ultimately the AFL-CIO concludes:

> "We therefore think it wholly consistent with these contractual theories to regard the no-strike clause as a collective obligation binding only on the union, and not as an individual obligation binding on employees who may engage in a wildcat strike or other peaceful work stoppage. Whether or not the union authorizes the strike should not affect the individual's freedom from personal liability." (p. 19.)

Although defendants are never quite so blunt, this is the essence of their position.

One would regard these arguments as facetious were they not so solemnly advanced. Stripped of euphemistic terminology, the position of the unions would reduce collective bargaining to a thinly veiled protection racket: all

the employer buys by entering into a collective bargaining contract—even though it contains the federally encouraged arbitration and no-strike provisions—is protection from an overt strike call by the union itself. The individual employees, in whose name the union purports to act, and from whom it presumably receives its power, remain free to extort whatever additional advantage they may for themselves, subject only to the risk of some mild disciplinary penalty.

A more cynical argument is difficult to imagine. Either a labor union speaks on behalf of those whom it represents, or it does not. Either bargaining is to be collective, or it is to be individual: it cannot be both at the same time. If a labor organization cannot or will not commit both itself *and the employees whom it represents* to the terms of a contract, its *raison d'etre* has ceased to exist.

The brief *amicus* is helpful, however, to the Court and to the country, although in a way the authors may not have anticipated. While it sheds no real legal light, emanating from the apex of the hierarchy as it does, it is more convincing than anything we could say that sometimes promises of responsibility are but will-o'-the-wisps which vanish when one seeks to grasp them. The brief demonstrates that responsibility must be imposed: it will not willingly be borne where it entails pain.

An appreciation of the practical consequences of the union's evasive position makes the legal arguments which follow more understandable. The unions repeatedly refer to the fact that an employer has a right to discipline wildcat strikers, contending that the availability of such discipline renders damage actions unnecessary. A moment's reflection will demonstrate the absurdity of the proposition, and, simultaneously delineate some of the practical considerations which come into play in wildcat strike situations.

First, discipline, whether mild or severe, does not place the employer in the position he would have occupied if the employees had not violated their obligation not to strike: discipline does not make the employer whole. Only an award of damages can do so.

Second, any discipline greater than a reprimand may be impossible as a practical matter. In the instant case, the complaint alleges that the work stoppage giving rise to this lawsuit involved 999 of the 1700 employees within the bargaining unit (R. 13). One of the previous stoppages involved three entire departments (R. 15); another involved 800 employees (R. 16). It is readily apparent that the discharge or layoff of any substantial number of employees involved in these layoffs would have had the necessary effect of shutting down the refinery.

This leads to the *third* problem connected with using discipline as a remedy for wildcat strikes. Discharge or discipline of any substantial number of wildcat strikers necessarily penalizes the employer and the enterprise by depriving it of a part of its work force. In effect, discipline merely legalizes the employee's absence from work for an additional period of time. The recent hearings over the rash of strikes at missile bases have revealed a glaring example of this point. Senator McClellan stated:

> "Many of these work stoppages were deliberately called to create the need for overtime work. The testimony has shown that both the unions and men knew the scheduled target dates had to be met and that postponing the work would necessitate lucrative overtime if the jobs were to be finished on time." (91 Daily Labor Report [1961] F:1; May 11, 1961.)

Fourth, insofar as discharges are involved, there is no necessary correlation between the punishment to the employee and the amount of damage which he has caused. For example, in the instant case the *ad damnum* is $12,500,

and there are 24 individual defendants. A full recovery, equally divided, would impose a liability of about $520.00 on each individual defendant. However, if each had been discharged, his loss in future earnings, pension and other welfare and fringe benefits would be far in excess of that amount. Obviously a damage action may be a far milder remedy than discipline.

When one realizes the inadequacies of discipline as a remedy for wildcat strikes, it is clear that the objective of defendants and the AFL-CIO is an attempt to emasculate Section 301. They seek nothing less than a license for their members to commit wildcat strikes. If this objective were ever achieved, it would be a very stupidly led union indeed that ever ran any risk of liability for breaching its no-strike commitment.

Once the unions' ultimate objective is unmasked, the plethora of arguments advanced in behalf of these contentions are easily dealt with. No matter how ingenious they appear at first blush, they are too frail to support the massive objective sought.

As best we understand it, the unions assert that Count II is invalid because it conflicts with federal labor policy in the following respects: (1) since the individual defendants' activities may have been "protected" under the National Labor Relations Act, common law tort actions have been extinguished under the doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (Def. Br., p. 65; AFL-CIO Br., pp. 13-16); (2) that Section 301 does not allow for, or permit, suits against individual employees and therefore extinguishes any such cause of action which may have existed at common law (Def. Br.; AFL-CIO Br. pp. 8-13); (3) that permitting damage actions against individual employees would permit individual settlement of such suits, thus undercutting the right of defendant unions

to act as the "exclusive" bargaining representative under Section 9(a) of the Act (AFL-CIO Br. p. 12); and (4) that recognizing state causes of action against individual employees will destroy the uniformity of federal labor policy (Def. Br.).

We deal with these contentions below.

1. The National Labor Relations Act Does Not Pre-empt the Jurisdiction of Federal or State Courts to Decide Actions for Breaches of a Collective Bargaining Contract.

This Court has recently made it clear that "the pre-emptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant" in suits for violation of a collective bargaining contract. *Local 174, Teamsters* v. *Lucas Flour Co.* (October Term, 1961, No. 50) ..... U. S. ....., fnt. 9. "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law'." *Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 513.

2. Whether or Not Specifically Authorized by Section 301, Damage Actions Against Individuals for Breaches of a No-Strike-Arbitration Agreement and Inducement of Similar Breaches by Other Employees Under Similar Obligation, Are Compatible with It and Implement, Rather Than Frustrate, the Policy Which It Expresses.

Defendants flatly assert that Section 301 "allows neither a suit by or against an individual for breach of a collective bargaining contract" (Def. Br., p. 54). Section 301 does not so read. It is not restricted to suits between an employer and a labor organization. Rather, it authorizes "[s]uits for violation of contracts between an employer and a labor organization" (Sec. 301(a)).

Although Count II is founded upon individual causes of

action, it is precisely the type of suit authorized by Section 301. In any event Count II is fully consistent with the policy explained in Section 301 and other provisions of the Act, will not frustrate its purposes, but will implement them.

In *Baun* v. *Lumber & Saw Mill Workers Union*, 46 Wash. 2d 645, 284 P. 2d 275, a $10,000 judgment against a union and certain of its officers and members for conspiracy that effectuated a wrongful discharge of a mill superintendent was reversed solely because of an incidental erroneous instruction. The individual union members advanced the identical argument advanced here. The Supreme Court of Washington squarely rejected it, stating:

> "We find no merit in the contention that the Labor Management Relations Act, 29 U. S. C. A. § 185 and 187, does not permit a judgment against the individual union member. What the statute relied on says (and it is limited to money judgments in the district courts of the United States) is that a judgment against a labor organization shall not be enforceable against its members, which is a far cry from saying that a judgment cannot be recovered against individual members in consequence of their individual actions. The argument is a complete *non sequitur*" (284 P. 2d at 286).

The following examination of the legislative history of Section 301 clearly demonstrates the correctness of *Baun* and of the Court of Appeals below:

Prior to adoption of Section 301, the law in many states was that unions, being merely voluntary associations, could not be sued as entities. See for example *Pullman Standard Car Manufacturing Co.* v. *Local Union*, 7 Cir., 152 F. 2d 493. And where an action for union misconduct could be maintained by suit against all or some of the members, the judgment, in at least some states, could be satisfied out of the personal assets of the particular defendants even though they had not participated in, or endorsed the ac-

tivity that was involved. (See the history of *Loewe* v. *Lawlor*, 208 U. S. 274, the so-called *Danbury Hatters* case, where there was a judgment for $250,000 and attachments were issued against the goods and estates of more than 150 named defendants, referred to in Justice Frankfurter's dissent in *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 473).

Section 301 was designed merely to cure the twin evils of union non-suability and individual responsibility for non-authorized conduct by (a) making unions suable as entities (on contracts) in Federal Courts, and (b) limiting satisfaction of judgments in such suits to the assets of the union. At the time the law was adopted both its proponents and opponents repeatedly declared that such (and such only) were its objectives and that it did not change or destroy other rights.

In discussing an amendment to the Case bill which was similar to Section 301, Senator Taft stated:

> "What good is a collective-bargaining agreement if people are not bound by it? If there is a collective-bargaining agreement and the men are bound by it, they ought to carry it out. If the union wants to carry it out, and some of the men say, 'We will not do it,' *they ought to be liable.* This provision applies only if the action of the individual is a violation of the collective-bargaining agreement." (92 Cong. Rec. 5706; quoted at 353 U. S. 504; emphasis added).

Senator Taft, in the course of the debates over Taft-Hartley, stated on April 23, 1947 that:

> "Mr. President, title III of the bill, on page 53, makes unions suable in the Federal courts for violation of contract. As a matter of law unions, of course, are liable in theory on their contracts today, but as a practical matter it is difficult to sue them. They are not incorporated; they have many members; in some States all the members must be served; it is difficult to know who is to be served. But the pending bill pro-

vides they can be sued as if they were corporations and if a judgment is found against the labor organization, even though it is an unincorporated association, the liability is on the labor union and the labor-union funds, and it is not on the individual members of the union, where it has fallen in some famous cases to the great financial distress of the individual members of labor unions" (93 Cong. Rec. 3955).

Senator Smith, on April 30, 1947, also stated that:

"I now come to title III, which is very brief, and merely provides for suits by and against labor organizations, and requires that labor organizations, as well as employers, shall be responsible for carrying out contracts legally entered into as the result of collective bargaining. *That is all title III does*" (93 Cong. Rec. 4410; emphasis added).

Senator Ball observed that:

"* * * we give to employers the right to sue a union in interstate commerce, in a Federal court, for violation of contract. *It does not go beyond that.* As a matter of law, I think they have that right, now, but because unions are voluntary associations, the common law in a great many States requires service on every member of the union, which is very difficult; and, if a judgment is rendered, it holds every member liable for the judgment.

"The pending measure, by providing that the union may sue and be sued as a legal entity, for a violation of contract, and that liability for damages will lie against union assets only, will prevent a repetition of the *Danbury Hatters'* case, in which many members lost their homes because of a judgment rendered against the union which also ran against individual members of the union" (93 Cong. Rec. 5146; emphasis added).

Even Senator Pepper, an outspoken opponent of the Taft-Hartley Act, clearly recognized that Section 301 did not in any manner change or extinguish causes of action

against an individual employee for wrongful conduct by him. He said:

> "* * * what the conferees are looking for is a way to drain dry the union treasury, not only to put the worker in jail for what he did personally, *or sue him personally for what he did,* if it was wrong, but they want to authorize vexatious suits against the labor-organization treasury, because if the organization has not any money in its treasury it cannot effectively help the workers" (93 Cong. Rec. 6680; emphasis added).

The foregoing examination of the legislative history shows, we think conclusively, that Congress had no intention of removing the liability of individuals for their own improper conduct in labor matters. By providing that unions could be sued as entities on their contracts Congress certainly did not intend to overturn the law that individuals could be sued in tort for inducing the breach. Much less did it intend to say that individuals no longer were to be responsible on their own contracts or that they could, with impunity, induce other individuals to violate their individual contracts.

What Congress was striving for, and all that it was striving for, was to make it possible to enforce liability against union entities as such where a proper case could be shown, and to relieve individuals of responsibility for actions in which they had had no part, but for which, under earlier law in some states, they could be held responsible. There was utterly no intent on the part of Congress to change the well established law that merely because individuals were officers of a union they did not escape liability for individual conduct that they had engaged in. That law was well established both prior to and after the Taft-Hartley Act. Thus, in *Wortex Mills* v. *Textile Workers of America,* 380 Pa. 3, 109 A. 2d 815, it is stated (p. 822):

> "Officers and individual members of a union or other

> similar unincorporated association are liable for acts which they individually commit or participate in or authorize or assent to or ratify."

And in *Underwood* v. *Maloney*, 256 F. 2d 334, the Court of Appeals for the Third Circuit said (p. 339):

> "It is settled law that officers or individual members of an unincorporated association are liable for acts which they individually commit or to which they contributed."

Defendants, however, interpret this Court's *Westinghouse* decision as a holding that Section 301 forbids any action (state or federal) by, for or against an individual employee. (*Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437.) This argument will not stand examination:

Westinghouse is clearly distinguishable from the case at bar. In that case a union was suing to collect asserted pay claims on behalf of the employees it represented. There is no federal policy as to what wages should be in general, other than that expressed in the Wage-Hour Laws. But in the instant case it is the no-strike, arbitration agreement which plaintiff seeks to enforce and implement. These are the very promises which Congress desired to see incorporated in collective agreements and which Section 301 was designed to make fully enforceable.

This leads to the larger question of whether or not individual damage actions brought to enforce the no-strike and arbitration provisions of a collective bargaining contract are "incompatible" or "inconsistent" with the "federal scheme to promote industrial peace" or would tend to "frustrate" it (*Lucas*). We believe that we have already abundantly demonstrated in our brief on the injunctive aspect of this case that the overwhelming desire of Congress in enacting Section 301 in particular, and the

Labor-Management Relations Act of 1947 in general, was to secure adherence to collective bargaining contracts once they were made. (pp. 23-26.) We will not belabor that point further here, but only point out that unless there is a remedy against the individual violator of a labor contract, as a practical matter there can be no enforcement of that contract in most cases. If an illegal strike is, in fact, instigated by the union, it will always remain open to it in any action under Section 301 to plead that the strike was solely the result of individual action for which no liability should attach. On the other hand, there are certain wildcat strikes which are not approved by the bargaining representative. Recently, the Secretary of Labor advanced this thesis as an explanation of the increase in illegal strikes at missile bases.[8] Clearly, in such situations only action against the individuals involved can effectuate the federal policy of promoting labor peace.

3. Damage Actions Against Individual Employees Will Not Undercut a Union's Right of Exclusive Representation, But Will Fortify It.

The AFL-CIO asserts that permitting damage actions against individual wildcat strikers will undercut the authority of the majority union to act as "exclusive representative" of all the employees within a bargaining unit conferred by Section 9(a) of the Act. Its brief writers state:

> "In effect, a judicial proceeding would become the instrument whereby the employer could negotiate with individual employees concerning their right to engage in one of the most crucial of concerted activities and one generally covered in the collective agreement" (p. 12).

8. Letter from Secretary of Labor Goldberg to Senator McClellan, reported in 49 Daily Labor Report [1962] A:1; March 12, 1962.

This is logic turned upside down. The wildcat striker, attempting to extort an advantage for himself above and beyond that provided in the collective agreement, is the party who is challenging the majority union's right of exclusive representation. Section 9(a) itself prohibits the exaction of such an advantage. Nor may it be said that the settlement of a lawsuit against an individual wildcat striker is bargaining over "wages, hours * * * or other conditions of employment." In this particular case the matter would appear to be moot because the same counsel are representing all defendants, union and individual.

4. Recognition of State Causes of Action Against Individual Wildcat Strikers Will in No Way Detract from the Uniformity of Federal Law Applicable to the Subject Matter.

The contention that recognition of state causes of action against individual employees for breaching their commitment not to strike, or inducing similar breaches by others, will destroy uniformity of federal law is without foundation. The most recent decisions of this Court have made it clear that it realizes that " 'diversities and conflicts' may occur", that "this not necessarily unhealthy prospect is no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction," and that this Court will continue to "resolve and accommodate such diversities and conflicts" as it has in the past (*Dowd Box Co.* v. *Courtney,* 368 U. S. 502, 514).

Whether state causes of action against individuals remain, or whether they are absorbed into federal law, is considerably less important than that collective agreements are to be "fully enforceable." The *Lucas* case clearly indicates that only actions which conflict with federal policy need be superseded: substance and not form will control. In *Lucas,* the trial court proceeded upon a theory of tort liability (ftn. 3); the Supreme Court of

Washington viewed the pleadings as establishing a breach of contract theory under state law and affirmed; and this Court affirmed on the basis of federal law (*Local 174 Teamsters* v. *Lucas Flour Co.*, October Term, 1961 No. 50). We conclude that the jurisdiction of the federal courts may be utilized to assure uniformity of whatever remedies and causes of action are recognized.

II.

THE CONTRACT CONTAINS NEITHER AN UNDERTAKING BY THE EMPLOYER TO SUBMIT CLAIMS FOR VIOLATION OF THE ARBITRATION AND NO-STRIKE CLAUSES OF THE CONTRACT TO ARBITRATION, NOR A COVENANT NOT TO SUE THE UNIONS UNDER SECTION 301 OF THE TAFT-HARTLEY ACT.

Defendants assert that Counts I and II should be dismissed or stayed because (a) plaintiff was required to assert all claims for breach of contract against the unions through the grievance procedure and arbitration and (b) that in fact the issues will be determined by assertedly pending arbitrations involving some of the individual defendants. Defendants' arguments are so complex that they must be examined in detail.

Plaintiff's position is simple: Section 301 gave it a right to sue the union for breach of the no-strike covenant. Plaintiff did not, by the contract, waive that right or agree to submit any claims against the union to the grievance procedure and arbitration.

We shall deal with these propositions below, but in approaching them it is suggested that the inherent differences between the positions of employers and unions with respect to arbitration of interim disputes under a contract must not be lost sight of:

The employer, at least theoretically, has full control

of the place of employment and must make the initial decision, or take the initial action, toward operating the premises; the bargaining agent, on the other hand, does not have that control but exists to complain or "grieve" if the control is wrongly exercised. The incident which precipitated the February 13-14, 1959 walkout furnishes an example. The employer made a decision that 3 employees should, under shop rules, be "docked" 15 minutes' pay because of tardiness. The contract did not require it to submit the question to the grievance procedure before taking action. It was entitled to take action subject to being reversed through the grievance procedure if it was wrong. The incident has countless variants and they all lend themselves to satisfactory solution and correction if necessary, by arbitration. National policy so recognizes. (See p. 26, *supra.*)

On the other hand if an employer had to obtain advance consent of an arbitrator on each day to day decision as to seniority, shop procedure and the like, productivity would drop to the vanishing point. Lost wages can be restored but no arbitrator can restore lost production. And so far as breaches of the no-strike clause are concerned arbitration is wholly unsatisfactory for the arbitrator cannot compel employees actually to pay for the damages they have created—he cannot issue writs of execution.

A. An Action Against a Union for Breach of a Collective Bargaining Agreement Was Specifically Authorized and Contemplated by Section 301 of the Taft-Hartley Act.

This is the precise type of case Congress authorized by Section 301 of the Labor-Management Relations Act—a suit in federal court against a union for breach of the arbitration and no-strike clauses of a collectively bar-

gained contract.[9] Yet, defendants would have the Court hold that, properly construed, the very Act which Congress passed to permit the bringing of a suit such as this prevents bringing it and requires that enforcement of the no-strike pledge be submitted to arbitration. A more incongruous result is difficult to imagine because:

1. The prime Congressional purpose in adopting Section 301 was to make contracts enforceable against unions by suits in Federal Courts. No-strike pledges prior to 1947 had been violated repeatedly,[10] enforcement of them was a basic Congressional objective. (Note President Truman's message to the post-war Labor Management Conference quoted at 353 U. S. 530-1.)

2. The Act was passed in 1947. Immediately thereafter union attorneys and officials advised unions either to take no-strike pledges out of their contracts, or to insert exculpatory clauses by which employers would either completely waive or greatly limit the right to sue for violation thereof.[11] In "Collective Bargaining and the Taft-Hartley Act", *33 Iowa Law Review 623 (1948)*, the author states:

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9. The legislative history of 301 is examined at pp. 59-62, *supra*, and in the Appendix to *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 485-546. See also Petitioner's Brief in *Drake Bakeries, Inc.* v. *Local 50, etc.* No. 598, October Term 1961, at pp. 9-20.

"The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." *Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 508-509. This is further substantiated by *Local 174, Teamsters* v. *Lucas Flour Company*, ... U. S. .... (No. 50, October Term, 1961, March 5, 1962), wherein the Court affirmed a judgment against a union for a violation of its contractual obligation not to strike.

10. Mangum "Taming Wildcat Strikes," *Harvard Business Review*, March-April (1960), p. 88.

11. This matter is covered in many periodicals, *e.g.*, Daykin, "Collective Bargaining and the Taft-Hartley Act," 33 Iowa L. R. 623 (1948); Note, "Union Escape Clauses and the Taft-Hartley Act," 48 Col. L. R. 105 (1948). A sample contract containing an exculpatory provision can be found in Smith and Merrifield, *Labor Relations Law, Cases and Materials*, Rev. Ed. (1960), Appendix, p. 97.

"The Chief Counsel of the AFL has prepared suggestions to be followed in negotiating labor contracts. * * * Unions affiliated with the AFL are advised to attempt to include the following provisions in all contracts: (1) Liquidated damage clauses which provide a fixed maximum sum to be recovered by either party in suits for breach of contract; (2) Maximum use of exclusive arbitration to settle disputes and grievances in order that little or no resort will be had to courts; and (3) Provisions to define and limit the Union's responsibility for conduct of agents. Where no-strike clauses are eliminated from contracts, it is suggested that an added clause provide that nothing in the agreement prevents a strike or other concerted work stoppage and that workers may leave the employment of the company either singly or jointly" (p. 649).

3. The foregoing shows that for years it has been crystal clear that labor unions could be sued in Federal Courts for violation of no-strike provisions of contracts; that, if a union wished to limit this potential liability, it had to do so by a contract provision for which many samples or forms have been available. The instant contract contains no such limitation or exculpatory clause whatsoever.

4. The objective in construing any contract, labor or otherwise, "is to ascertain the intent of the parties from the language used" (*Slater* v. *Emerson,* 60 U. S. 224, 238). Can it rationally be said that by the instant contract Sinclair intended to waive its right to sue and agree to submit to arbitration what would otherwise be a valid cause of action against the unions?

In sum: *first,* this suit is precisely the type that Section 301 of the Taft-Hartley was intended to make available to remedy the precise evil here complained of; *second,* the parties knew when the contract was signed that it did contain a no-strike clause and did not contain a semblance of

a restriction on the employer's right to sue for violation of that clause; and *third*, the assertion that the parties intended to waive the employer's right to sue and to substitute arbitration as the sole remedy for violation of the no-strike provision is but a specious effort to avoid accountability.[12]

B. There Is No Undertaking in the Contract by the Employer to Submit Its Claims Arising From the Breach of the No-Strike Clause to the Grievance Procedure or Arbitration.

The keystone of defendants' involved argument necessarily is the contention that the collective agreement contains a promise by the employer to utilize the grievance procedure (and arbitration, if need be), rather than to resort to the courts for decision of any claims which it may have against the unions or individual employees arising out of breach of the no-strike clause. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582. Defendants assert that the contract contains such a promise to arbitrate or, at least, that it is "susceptible" of such an interpretation (Point I. B., p. 22). Defendants attempt to *imply* such an undertaking on three bases:

1. They assert:

"* * * [P]aragraph 3 of Article XXVI, which pro-

12. To carry the defendants' argument to its ultimate conclusion, all that would be necessary for a union to do when sued under § 301 for an alleged contract violation is to have one or more of its officials file spurious grievances claiming overtime pay for the dates in question and then move for a stay of the law action because the arbitrator *might* decide some issues common to both proceedings, *e.g.*, did the grievants participate in or cause the violation, or did they work overtime or lose a guaranteed right to do so.

> vides a time limit for submission of a grievance *by the employer* or union 'within sixty (60) days from the date on which the complaint or grievance arose * * *' " (p. 28, emphasis supplied).

Insofar as this sentence asserts that Section 3 of the grievance and arbitration procedure (R. 19, Art. XXVI) provides a right for the employer to submit grievances or imposes a time limit for so doing, it is an outright misstatement of the wording of the contract, which actually provides:

> "3. No complaint or grievance shall be considered hereunder unless it is presented to the superintendent or official locally in charge within sixty (60) days from the date on which the complaint or grievance arose, or from the date on which the employee or employees concerned first learned of the cause of complaint."

Defendants' attempt to read into Section 3 the word "employer," which simply does not appear there, is improper. Not only is there no such provision but it is clear that the provisions contemplate only grievances by or for employees against the employer and not the reverse.

2. Defendants suggest that because Article XXVI, Paragraph 6 (R. 19), provides that the President of the International Union and the Director of Industrial Relations for the Employer are to attempt to resolve "grievances *or disputes*" which have not been settled at a lower level, arbitration is available for the settlement of *all* disputes between the parties. However, Section 1 and 2 of Article XXVI read together, make it clear that the only arbitrable "grievances and disputes" are those relating to "wages, hours and working conditions."

3. The third method by which defendants seek to imply a promise by plaintiff to arbitrate is more involved. Defendants argue that the definition of a "grievance" is so broad that it would encompass the claim for damages in-

volved in this lawsuit. The contractual definition is as follows:

> "A grievance is defined to be any difference regarding wages, hours or working conditions between the parties hereto or between the Employer and an employee covered by this working agreement which might arise within any plant or within any region of operations." (R. 19, Art. XXVI, Sec. 1.)

Using this clause as a point of departure, defendants appear to reason as follows:

(1) The phrase "hours, wages or working conditions" is similar to the language found in Section 8(d) of the Taft-Hartley Act which defines the duties of parties in collective bargaining; (2) Section 203(d) talks of methods for resolving disputes over the application or interpretation of a collective bargaining agreement; (3) the Section 8(d) language is more comprehensive than that found in Section 203(d); (4) therefore, it is *"highly unlikely"* that the parties to the instant contract meant a narrower scope of arbitrable disputes than that contained in Section 203(d), since (5) Article XXVI, Paragraph 8, provides for the selection of an impartial arbitrator from a Federal Mediation and Conciliation Service panel, and (6) since the *Warrior* contract was similar to the language in 203(d); (7) *Warrior* requires a stay.

There are many things wrong with this chain of reasoning. Foremost is the fact that the instant contract *does not,* unlike *Warrior,* make all differences between the parties "as to the meaning and application" of the contract subject to the grievance-arbitration machinery. Further, there is not a single case which holds that a no-strike clause is bargainable *for the reason* that it is a subject included within the phrase, "wages, hours or working conditions." The reason is obvious. A "strike" cannot rationally be defined as "wages," "hours" or "working

conditions": Certainly a strike is neither "wages" nor "hours" [of work]; it is a complete negation of "work" or any condition of work. A no-strike clause is what an employer receives in return for the "wages, hours and working conditions" which he is willing to offer and the employees and their representative are willing to accept. Such clauses are bargainable because they stabilize employment and implement the purpose of the National Labor Relations Act.

Thus, although the definition of a grievance is broad, it is apparent that it is not broad enough to comprehend a claim by the employer for violation of the no-strike and arbitration clauses of the agreement.

Examination of Article XXVI (R. 19, p. 31) in its entirety emphasizes the point that it does not provide for grievances or arbitrations involving the types of questions involved in this lawsuit. The "Grievance and Arbitration Procedure" contains a detailed specification as to precisely where, how and when union or employee grievances are to be filed and with what management representative. But there is no provision whatsoever for employer grievances. In particular, only designated officers of defendant International have the right to initiate the convening of an Arbitration Board (R. 19, Art. XXVI, Sec. 7).

In sum, in the instant case there is no undertaking by plaintiff to arbitrate or to grieve as to any manner of dispute or claim which it may have against defendants, much less is there any authorization for an arbitrator to award damages or enter an injunction against defendants. While recent decisions of this Court have given a broad interpretation to arbitration clauses in general, none of them have asserted so broad an authority for the arbitrator as defendants here propose.

Defendants' further assertion that for the Court to de-

cide whether or not the defendants violated the no-strike clause "involves a premature intrusion into the arbitrator's jurisdiction," is wrong for two basic reasons:

1. No matter how defendants attempt to distort the teachings of *Warrior, Enterprise Wheel* and *American Mfg. Co.*,[13] the fundamental principle underlying any agreement to arbitrate remains the same, *the arbitrator's authority derives from the agreement, and his jurisdiction is therefore limited to those matters which the parties by their agreement have entrusted to him for decision.*[14]

2. While questions as to the merits of an arbitrable grievance are at least initially for the arbitrator regardless of how frivolous they may appear, *arbitrability* is still a question for the courts to decide.[15]

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13. In the recent case of *Vulcan-Cincinnati, Inc.* v. *United Steelworkers*, 6 Cir., 289 F. 2d 103, the court observes that in these cases this Court was considering the arbitrability of unsettled grievances initiated by employees or their representatives (not a company claim based on a no-strike clause violation).

14. *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582.

15. "It is clear that under both the agreement in this case and that involved in *American Manufacturing Co., ante*, p. 564, the question of arbitrability is for the courts to decide. Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1508-1509. Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose." (Footnote to majority opinion in *Warrior*, 363 U. S. 574 at 583.)

"To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is 'arbitrable' is inescapably for the court." (Concurring opinion of Justices Brennan and Harlan in *American Mfg. Co.*, 363 U. S. 565 at 570.)

C. A Labor Organization Which Spurns Use of the Arbitration Procedure and Violates Both the Arbitration and No-Strike Clauses by Engaging in a Wildcat Strike Rather Than Processing a Grievance Through the Procedure Provided by the Contract Is Precluded from Insisting That Its Violations Are Triable Only by an Arbitrator Rather Than Under Section 301 of the Labor Management Relations Act, 1947.

Even were we to assume *arguendo* that plaintiff *could* arbitrate this case, it would not follow that defendants have standing to insist—by motion to stay—that an arbitration board is the *only* forum available. A stay is a variety of injunction and equitable considerations condition the situations in which it is available. *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379. "[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward * * *." *Landis* v. *North American Co.*, 299 U. S. 248, 255.

Can defendants state such a case? To briefly restate, defendants agreed:

> "when a grievance arises, the following [grievance] procedure *must* be followed * * *." (Comp., Par. 6 at Art. XXVI, § 1, R. 11; R. 19; emphasis added.)

and again:

> "there shall be no strikes or work stoppages:
> (1) For any cause which is or may be the subject of a grievance * * *."
> (Comp., Par. 5 at R. 10; Art. III, R. 19.)

Defendants breached both promises by striking rather than grieving over alleged grievances having a total value of $2.19. Nor was the breach trivial: it involved 999 out of 1700 employees and lasted two days (R. 16). It is difficult to envision parties less entitled to equitable consideration than these defendants.[16]

16. Cf. Sec. 8 of the Norris-LaGuardia Act.

It is also clear that to reward a union which has resorted to force rather than to arbitration by granting it a motion to stay a suit at law frustrates national policy, fails to place effective sanctions behind the agreement not to strike, and does not stabilize conditions of employment. These are the considerations which underlie many of this Court's recent decisions and control the result in this case.

In *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, this Court relied extensively upon the legislative history of § 301 and quoted from the Senate Report:

> " 'The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract' " (p. 454).

The Court concluded that federal law includes "specific performance of promises to arbitrate grievances (p. 451); that "the agreement to arbitrate grievance disputes * * * should be specifically enforced (p. 451); and that Section 301 made "collective bargaining contracts * * * 'equally binding and enforceable *on both parties*' " (p. 454; emphasis added).

Warrior and companion cases handed down by this Court on June 20, 1960 emphasize that the full power of the federal government is to be thrown behind and in support of the enforcement of agreements to arbitrate grievances.[17]

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17. *United Steelworkers* v. *American Manufacturing Company,* 363 U. S. 564; *United Steelworkers* v. *Warrior & Gulf Navigation Company,* 363 U. S. 574; *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U. S. 593; and *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Co.,* 363 U. S. 528.

What the Court said in *Warrior* is applicable here:

> "In the commercial case, arbitration is the substitute for litigation. *Here arbitration is the substitute for industrial strife*" (p. 578; emphasis added).
>
> "The Congress * * * has by § 301 * * * assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate" (p. 582).

With a few clearly distinguishable exceptions the lower courts which have been confronted with the precise issue of whether to grant a stay under similar circumstances have declined to do so.[18] In the recent case of *Vulcan-Cincinnati, Inc.* v. *United Steelworkers*, 6 Cir., 289 F. 2d 103, 108, the court concludes that the principles enunciated in *Warrior, American Mfg. Co.* and *Enterprise Wheel* do not "conflict with our holding in *Benton Harbor* [242 F. 2d 536], nor do they change our conclusion that in the case before us a violation of the no strike clause was not a matter to be submitted to arbitration."

These decisions firmly establish the principle that a stay of an employer's action for damages, for the purpose of submitting to arbitration the very question which the courts are told to decide by Section 301 of Taft-Hartley, is not authorized by either that section or the United States Arbitration Act, 9 U. S. C. § 1, *et seq.* Those few cases which granted a stay (*e.g., Yale & Towne Mfg. Co.* v. *Local 1717*,

18. *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, D. Mass., 129 F. Supp. 313, 315, afm'd, 1 Cir., 230 F. 2d 576; *Gay's Express, Inc.* v. *International Brotherhood of Teamsters*, D. Mass., 169 F. Supp. 834, 836; *Markel Electric Products* v. *U. E.*, 2 Cir., 202 F. 2d 435; *Drake Bakeries, Inc.* v. *Local 50, etc.*, 2 Cir., 287 F. 2d 155, and 294 F. 2d 399, cert. granted (No. 598, October Term, 1961); *International Union* v. *Colonial Hardwood Flooring Co.*, 4 Cir., 168 F. 2d 33; *U. E.* v. *Miller Metal Products, Inc.*, 4 Cir., 215 F. 2d 221; *Lodge No. 12, etc.* v. *Cameron Iron Works*, 5 Cir., 257 F. 2d 467, cert. den. 358 U. S. 880; *Hoover Motor Express Co.* v. *Teamsters, etc.*, 6 Cir., 217 F. 2d 49; *International Union* v. *Benton Harbor Malleable Industries*, 6 Cir., 242 F. 2d 536; *Vulcan-Cincinnati, Inc.* v. *United Steelworkers*, 6 Cir., 289 F. 2d 103; *Cuneo Press* v. *Kokomo Paper Handlers*, 7 Cir., 235 F. 2d 108.

Machinists, 3 Cir., ... F. 2d ....., 49 L. R. R. M. 2652) did so because, unlike the present case, the scope of "the arbitration provision(s) involved (was) broad" and unlimited, and in several instances the union had not struck until after unsuccessfully seeking arbitration.[19]

III.

THE EMPLOYER HAS TAKEN NO ACTION WHICH WOULD CONSTITUTE A SUBMISSION OF THIS CASE TO ARBITRATION.

There are two types of agreements to arbitrate: agreements to arbitrate future disputes, usually referred to as executory agreements to arbitrate; and agreements to submit existing claims to an arbitrator, usually referred to as submission agreements. It is clear that Point "I" of defendants' brief is based on the theory that plaintiff, by the collectively bargained contract, entered into an executory agreement to arbitrate which would cover claims of violation of the no-strike clause. Apparently, although it is never very clearly stated, Point II of defendants' brief is based upon a claim that plaintiff and defendants

19. The majority in *Yale & Towne* notes that in the *Sinclair* contract "the arbitration provision was a narrow one, being limited to differences 'regarding wages, hours or working conditions'." The majority further comments that there was a limited arbitration provision in *Colonial Hardwood Flooring Co.*, and that in *Vulcan-Cincinnati, Inc., Benton Harbor* and *Cuneo* only employees could file a grievance and invoke arbitration. (May we add, the same observation is true here.)

Defendants also assert that "[a] decision of the Seventh Circuit shortly *after* its opinion in the present action [290 F. 2d 312] appears to fit comfortably with [defendants' construction of] this Court's dictates in *Warrior.*" *Nepco Unit* v. *Nekoosa-Edwards Paper Co.*, 7Cir., 287 F. 2d 452. We not only fail to understand the purpose of such a bold misstatement, but also fail to grasp how a decision (*Nepco*) made by the same court some two months *before* the opinion in our case was rendered in any way vitiates the latter.

entered into some kind of submission agreement to submit their various then existing differences to an arbitrator.

There is no support in the record for such a claim. At no time after the strike of February 13-14, 1959 did plaintiff agree to submit its claims against defendants, including those for damages, injunctive and declaratory relief, to arbitration.

Defendants' Point "II.A" is headed:

> "The employer's claim of liability for breach of the no strike clause at law raises common issues of fact and contract interpretation and application which have been raised by the grievances submitted to arbitration protesting the right of the employer to discipline the individual defendants for allegedly committing the same breach."

Nowhere in the brief or in defendants' motion to stay is there support for this assertion. True, the motion to stay recites in its Paragraph 3 "the plaintiff (and defendants) are presently agreed to submit the issues raised in the Complaint, to the grievance procedure, and, if need be, to impartial arbitration" (R. 23). But if this be deemed an allegation that plaintiff has entered into a submission agreement, rather than referring to the collective agreement, it is wholly without support in the *Swanson* affidavit attached to the motion (R. 24-25).

It is true that some two weeks after the strike the defendants filed the grievances appearing at pages 35-41 of the Record. But plaintiff cannot prevent defendants from filing grievances on whatever subject they choose. Nor can plaintiff prevent the unions from designating a person to act as its representative on the "Arbitration Board." This unilateral action by the unions, however, does not constitute a valid submission to arbitration. For a submission agreement, like any other contract, is a consensual

arrangement. At no time has plaintiff consented to submit its damage and other claims to an arbitrator.

In *District of Columbia* v. *Bailey*, 171 U. S. 161, 171 (1898), the Court recited well settled law:

> " 'The submission is the agreement of the parties to refer. It is, therefore, a contract, and will in general be governed by the law concerning contracts.' In *Whitcher* v. *Whitcher*, 49 N. H. 176, the Supreme Court of New Hampshire said (p. 180): 'A submission is a contract between two or more parties, whereby they agree to refer the subject in dispute to others and to be bound by their award, and the submission itself implies an agreement to abide the result, even if no such agreement were expressed'."

Prior to *Lincoln Mills* the courts differed as to whether executory contracts to arbitrate contained in collective agreements were enforceable, but submission agreements have long been enforceable provided they were valid as contracts. That doctrine has not changed. As this Court stated in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574:

> "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (p. 582.)

In the absence of any submission agreement, defendants' assertion that the grievances which they filed may involve the strike questions before the Court is wholly irrelevant: plaintiff has not *consented* to submit its claims arising from the strike to arbitration. Indeed, as the affidavit of plaintiffs' representative in charge of industrial relations reveals: no impartial arbitrator has been agreed upon by the parties; and the plaintiff will contend, if the union selects an arbitrator, that he is wholly without jurisdiction (R. 33-34).

While this wholly disposes of the contentions advanced

in Point II of defendants' brief, the assertion that the grievances filed by defendants involve the same questions before the Court may be further answered. None of the grievances filed (R. 37-41) would permit an arbitrator to award damages against the union or the individual defendants. None of the grievances filed would empower an arbitrator to award injunctive relief. None of the grievances filed would prevent the union once again from spurning its promise to arbitrate rather than to strike. While it may be true that arbitration of these grievances might involve some questions which are common to this lawsuit, obviously that is not the fault of plaintiff. If defendants find appearances in federal courts so distasteful, and so much more onerous than appearing before an arbitrator, they need only fulfill the promise which they have made to arbitrate their grievances rather than to strike.

CONCLUSION.

It is submitted that the judgment of the Court of Appeals in No. 434 be reversed, and that the judgment of the Court of Appeals in No. 430 be affirmed.

Respectfully submitted,

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March 31, 1962.

APPENDIX.

United States Constitution—Amend. V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

National Labor Relations Act, 61 Stat. 136, 29 U. S. C. 151, *et seq.:*

"Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full

freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

"Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

"Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also

mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification

is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purpose of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

"Section 201. That it is the policy of the United States that— * * *

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies."

"Section 203. (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

"Section 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be

brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"Section 303. (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. 101, *et seq.*

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

"Section 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

"Section 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

"Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employ-

ment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

"Section 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined), from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any state;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

"Section 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

"Section 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

"Section 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination), in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and

will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be

issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee), and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

"The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

"Section 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute, either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

"Section 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record

of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

"Section 10. Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceeding precedence over all other matters except older matters of the same character.

"Section 11. In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the contempt shall have been committed: Provided, That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

"Section 12. The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the

contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

"Section 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'later dispute' (as hereinafter defined), of 'persons participating or interested' therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

"Section 14. If any provision of this Act or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

"Section 15. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed."